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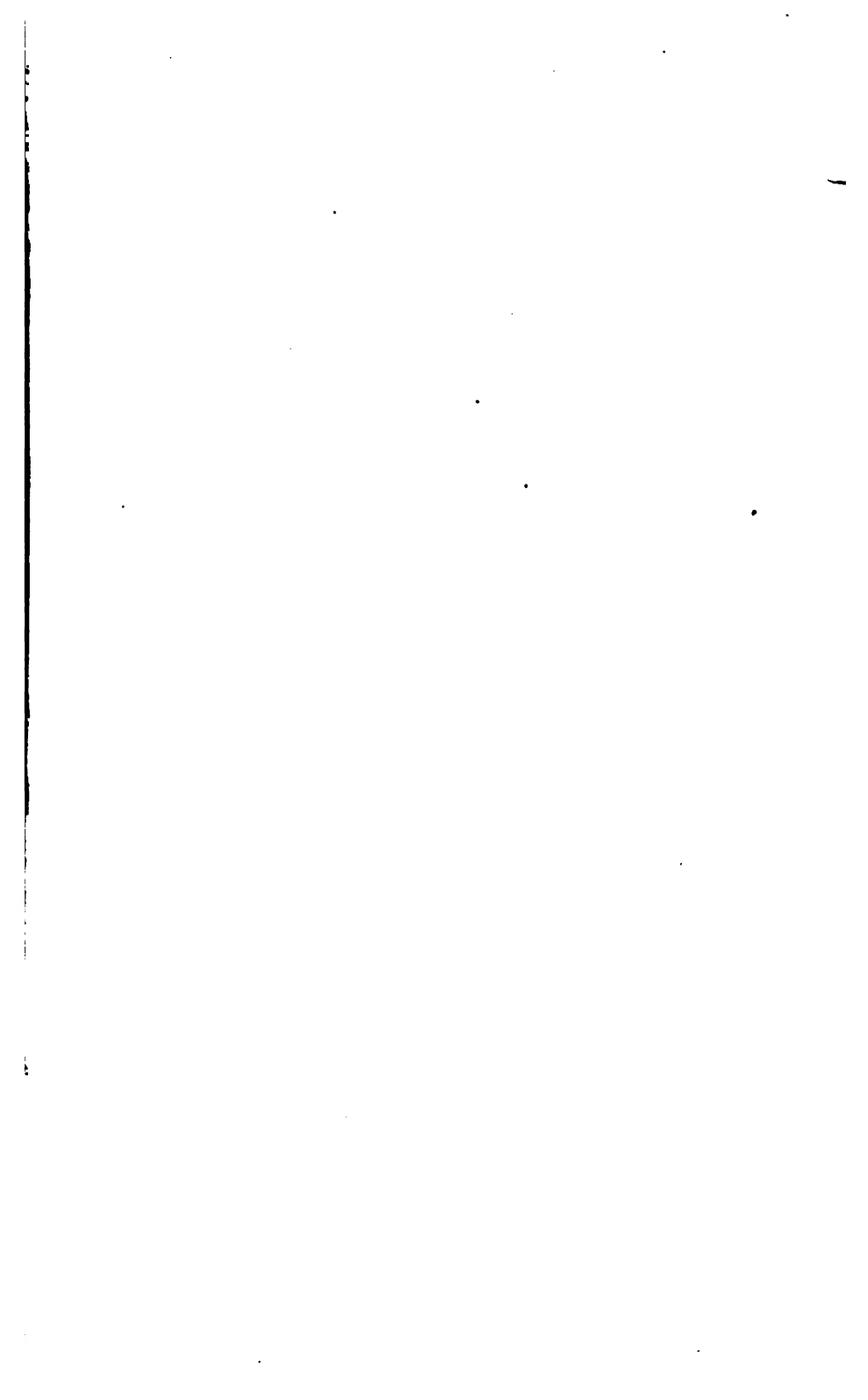


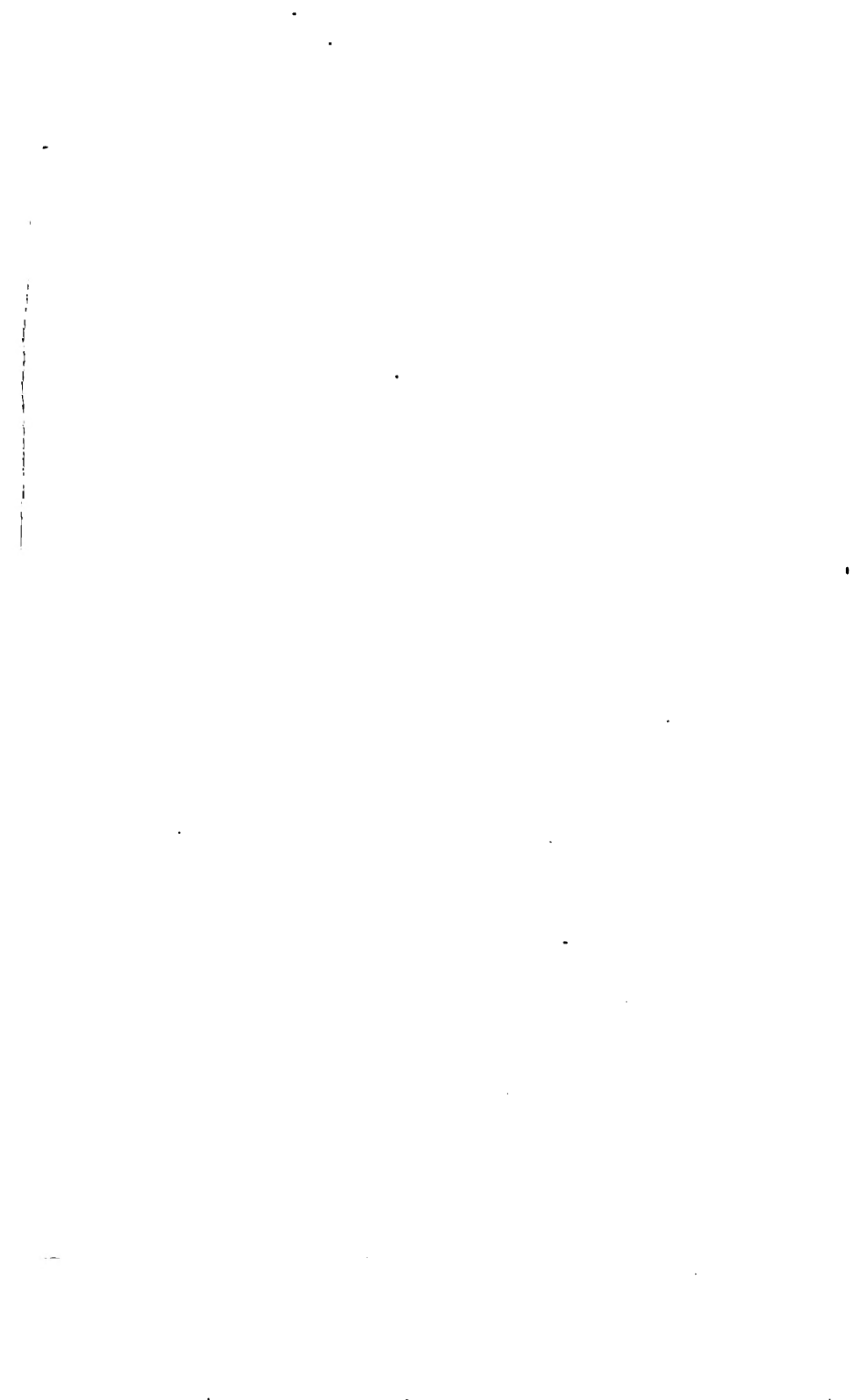
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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT

OF THE
STATE OF CALIFORNIA

C. P. POMEROY,
REPORTER.

VOLUME 129
WITH
NOTES ON CAL. REPORTS.

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at the hospital before August, 1877, and the presumption is that he had corresponded with the sisters upon the subject and that his address was well known to them. The letter having been properly addressed and mailed to him, it is presumed that he received it. (Code Civ. Proc., sec. 1963, subd. 24.)

Objection is made to the reception in evidence of certain depositions taken for plaintiff at St. Louis, Missouri, on the ground that the certificate fails to state that the deposition when completed was read over to the witness and corrected by the witness if he so desired, as required by section 2032 of the Code of Civil Procedure. That section applies only to depositions taken in this state, and, therefore, does not reach this case.

The judgment and order are affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[S. F. No. 1423. Department Two.—June 15, 1900.]

PACIFIC PRESS PUBLISHING COMPANY, Respondent,
v. G. T. LOOFBOUROW and W. J. SPENCER, De-
fendants. W. J. SPENCER, Appellant.

GUARANTY—LIABILITY OF GUARANTOR—MODIFICATION OF ORIGINAL CONTRACT—CONSENT OF GUARANTOR.—Although a guarantor is released from liability where the original contract is modified without his consent, he is not so released where modifications are consented to by him.

ID.—APPLICABILITY OF GUARANTY—EFFECT OF CONSENT.—Where the consent of the guarantor to any modification of the original contract exists, it is not necessary that the original guaranty should be changed or made expressly applicable to the modified contract; and it is immaterial whether the modification consented to was a benefit or disadvantageous to the guarantor.

ID.—SETTLEMENT OF TEMPORARY DIFFICULTY.—Where there was no actual breach of the contract on the part of the person to whom the guaranty was given, the fact that a temporary difficulty existed between the original parties to the contract is immaterial, if the settlement of it led to a modification of the contract, which was consented to by the guarantors.

APPEAL from a judgment of the Superior Court of Alameda County. S. P. Hall, Judge.

The facts are stated in the opinion of the court.

Davis & Hill, for Appellant.

The mere consent of the guarantor to acts of the parties to the original contract is not a consent to renew or continue his liability as guarantor. (Brandt on Suretyship and Guaranty, sec. 113; *Case v. Luse*, 28 Iowa, 527; *Kimball v. Royce*, 9 Rich. 295; *Hatch v. Antrim*, 51 Ill. 106; *Switzer v. Baker*, 95 Cal. 540.)

Samuel Bell McKee, and Max Marcuse, for Respondent.

The defendants first violated the contract, and cannot complain of the want of strict performance by the plaintiff. (*Twomey v. People's Ice Co.*, 66 Cal. 233; *Dunn v. Daly*, 78 Cal. 640; *Golden Gate etc. Co. v. Sahrbacher*, 105 Cal. 114; *Wilson v. Lindner*, 41 Ill. App. 239; 7 Am. & Eng. Ency. of Law, 2d ed., 149, 150.) Alterations of the contract consented to by the guarantor cannot affect his liability upon the guaranty. (Civ. Code, sec. 2819; Code Civ. Proc., sec. 1962, subd. 2; *Pimental v. Marques*, 109 Cal. 406; *Pelton v. Prescott*, 13 Iowa, 567; *Knoebel v. Kircher*, 33 Ill. 308; *Bell v. Mahin*, 69 Iowa, 408; *Jackson v. Johnson*, 67 Ga. 167; Brandt on Suretyship and Guaranty, 2d ed., sec. 384; *Crosby v. Wyatt*, 10 N. H. 318; *Strafford Bank v. Crosby*, 8 Me. 191; *Briggs v. Norris*, 67 Mich. 325; *Rutherford v. Brachman*, 40 Ohio St. 604; *Hutchinson v. Wright*, 61 N. H. 108; *Jackson v. Johnson*, 67 Ga. 167.)

McFARLAND, J.—This is an action brought by plaintiff against defendant Loofbourow for printing and binding a certain book, and against defendant Spencer as guarantor that Loofbourow would perform his part of the contract between him and plaintiff touching the printing, etc., of said book. Judgment went for plaintiff against both defendants for six hundred and sixty-four dollars and fifty cents, the amount due plaintiff on the contract. Loofbourow has not appealed, and it is admitted that the judgment against him is right. Spencer appeals from the judgment, bringing up the judgment-roll, which includes a bill of exceptions.

No exception was taken to any ruling of the court as to the admissibility of evidence, nor to any ruling at all during the progress of the trial. The court made voluminous findings; and to these appellant takes many exceptions, under the heads of "specifications of particulars" in which the evidence is insufficient to justify the findings of fact, "errors of law," and that "the decision is against law." The real position of appellant, however, is that the court erroneously concluded, as a matter of law from the facts in the case that appellant was liable as a guarantor. There is really no material conflict of evidence, and it clearly supports the facts found.

On July 16, 1896, the respondent Loofbourow entered into a written contract for the printing and binding of five thousand copies of the book, with specifications of the different kinds of work to be done and the prices therefor, the estimates for the total cost amounting to twelve hundred and forty-eight dollars and seventy-five cents. To this contract, and as a part of it, appellant attached his written guaranty that Loofbourow would pay for the book according to the contract. On September 15, 1896, respondent and Loofbourow entered into a written modification of the contract of June 16th, the particular changes being a reduction of the number of copies from five to three thousand, and of the estimated cost from twelve hundred and forty-eight dollars and seventy-five cents to one thousand and thirty-five dollars and seventy-five cents. To this appellant also attached his written consent and express guaranty. A large number of persons had subscribed for the book, and in each of these contracts there was the following provision: "The first moneys received on collections of same to be turned over to us (respondent) until the entire bill for printing and binding is liquidated." The whole of the money for the work was payable "in thirty days from the delivery of the first books." It is admitted that the work on the book was properly done. On October 5, 1896, about one hundred and eighty-five copies were delivered to appellant, who held an order for the same from Loofbourow, and had also an assignment from the latter of the subscription list as security for the guaranty. Appellant and Loofbourow delivered these books, or a large part of them, to

subscribers, and collected some money due thereon, but neglected and refused to pay any money collected to respondent as provided in the contract. On November 10, 1896, respondent wrote a letter to appellant calling attention to the fact that he had neglected to pay over the money collected on the subscriptions, as provided in the contract, and saying that respondent would be under the necessity of withholding the further delivery of books if that part of the contract was not complied with. On the next day—November 11th—appellant told respondent that he would not be guarantor any longer, because respondent had broken the contract, to which respondent objected. On the next day—November 12th—the parties came together and another written modification of the contract was made and signed by respondent and Loofbourow. The main features of this modification were that delivery of books by Loofbourow to subscribers was to continue, and that collections of the subscribers should be made by respondent and credited to the account of Loofbourow, collections to be pressed by respondent with diligence. It was also provided that certain cuts and electrotypes used by respondent in doing the work, and belonging to Loofbourow, would be delivered to the latter. Upon this written contract, and after the signatures of the other two parties, and as a part of the transaction, appellant wrote and signed the following: "I consent to the foregoing." The delivery of the books immediately proceeded; the respondent diligently collected all the subscriptions that could be collected. The amount thus collected was three hundred and sixty dollars and fifty cents, which left due respondent six hundred and sixty-four dollars and fifty cents, and for the latter amount judgment was rendered. The cuts and electrotypes were delivered to Loofbourow. All the books were delivered to Loofbourow by November 20, 1896, except some copies which under the contract were to be folded but not bound, and these latter were tendered to Loofbourow December 16, 1896, and the latter refused to receive them. There is no dispute about the amount due on the contract and we think that upon the facts the judgment is right.

In a part of his brief, counsel for appellant argues the case as though the action was founded on the instrument of No-

vember 12th alone, and that, as said instrument does not contain any formal words of guaranty, therefore appellant cannot be held as guarantor. But the action is based on the original guaranty, and the instrument of November 12th is only a modification of the original contract made with the consent of the appellant. Of course, when the original parties to a guaranteed contract change it in a material manner without the consent of the guarantor, the latter is released; but this principle has no application to a case like the one at bar, where the change has been made with the express consent of the guarantor. (See Baylies on Sureties and Guarantors, 290.) It is contended that appellant only consented to allow the respondent to collect the subscriptions, and to waive his rights as the assignee of Loofbourow; but his consent was to the whole of the instrument, which is on its face, as well as according to the evidence introduced without objection, a modification of the original contract, and would be incomplete and meaningless if not considered as referring to such contract. The court correctly found that appellant, as guarantor, consented to the modification. Neither do we think that the liability of appellant as guarantor is at all affected by what occurred between him and respondent during the two days from the 10th to the 12th of November. Waiving the point that appellant himself first violated the contract by refusing to pay to respondent the money collected on the subscriptions, still the mere failure of respondent to deliver books during those two days was not a violation of the contract, for nothing can be found in the contract which makes such failure a violation of it; and the court correctly found that it is not true that "down to and upon the twelfth day of November, 1896," respondent had not performed his part of the contract. If respondent had actually never delivered any more books, and appellant had taken no other action in the premises, then, perhaps, a different question would have been presented; but the temporary difficulty between the parties during the two days was immediately settled by the instrument of November 12th, to which appellant became a party by consenting thereto in writing—his consent being a part of the transaction. As he consented to it, it is not necessary to consider whether the modification was ma-

terial or in any way disadvantageous to appellant, although it was evidently a benefit to him, as it imposed on respondent the task of collecting the subscriptions. Upon the facts we see nothing which, as matter of law, relieves appellant's liability as guarantor.

The judgment is affirmed.

Temple, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[S. F. No. 1374. Department Two.—June 22, 1900.]

THOMAS MORAN, Respondent, v. THOMAS McINERNEY et al., Appellants.

PARTNERSHIP—PURCHASE AND SALE OF LAND—DISSOLUTION AND ACCOUNTING—LAND IN NAME OF ONE PARTNER—ENCUMBRANCES—SALE—RELIEF.—In an action to dissolve a partnership for the purchase and sale of real estate, and for an accounting and settlement thereof, real estate shown to belong to the partnership should be treated as personal property, and sold to pay debts, and the residue distributed; and it is improper for the court to decree that the plaintiff recover from the other partner and from codefendants an undivided half of real property which stood in the other partner's name, and was encumbered or conveyed while in his name for the payment of partnership and private debts.

ID.—RIGHTS OF PARTNERS—DISTRIBUTION SUBJECT TO LIENS—CONSENT REQUIRED.—Each partner is entitled to have the interests of the partners severed upon a dissolution and accounting; and unless the partners consent to distribution of partnership real property subject to liens to secure partnership debts and the individual debts of the partners, such a decree should not be entered.

ID.—POWER OF COURT AS TO LIENS.—The court has no power to declare that certain debts, and especially costs, shall constitute liens on the partnership real estate, nor to create a lien upon the partnership property or the portions thereof assigned to the parties; but, if costs or indebtedness are properly payable out of the partnership assets, the court should order them paid out of the proceeds of a sale of such assets.

ID.—ANSWER OF CREDITOR OF DEFENDANT PARTNER—AFFIRMATIVE RELIEF—ABSENCE OF SERVICE—UNAUTHORIZED JUDGMENT.—An answer of an individual creditor of the defendant partner which

claimed the affirmative relief of payment out of his interest in the partnership real estate, if not served upon such partner, nor answered by him as a cross-complaint, cannot support a judgment against him in favor of such creditor for the affirmative relief demanded.

ID.—EXECUTION SALE OF DEFENDANT'S INTEREST—INTERESTS NOT DEFINED—IMPROPER DECREE.—An execution sale of the defendant partner's interest in specified real estate of the partnership which stood in his name will not justify a decree which does not define the interest of the defendant partner or of the purchaser in such real estate, and does not award a liquidation of the partnership debts, and a sale and distribution of the partnership assets in definite amounts and proportions to specified persons, and which improperly awards a recovery by the plaintiff against all of the defendants of an undivided half of such specified real estate.

ID.—JUDGMENT IN FAVOR OF MORTGAGEE—FINDINGS.—A judgment in favor of a mortgagee of part of the partnership property, which is not supported by the findings, is erroneous.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. A. A. Sanderson, Judge.

The facts are stated in the opinion of the court.

M. C. Hassett, for Appellants.

T. Z. Blakeman, for Respondent.

TEMPLE, J.—The action was brought against defendant McInerney to dissolve a copartnership, and for an accounting. Plaintiff also asked that certain property be declared to be partnership property, and be distributed between plaintiff and defendant as partners. McInerney answered and denied the existence of the partnership and all allegations made by plaintiff in respect thereto. In this state of the pleadings a trial was had and an interlocutory decree was entered. No findings were made, but it was decreed that plaintiff and defendant did prior to May, 1870, enter into and form a copartnership for the purpose of buying and selling real estate, and subsequently did buy and sell real estate in pursuance of the partnership agreement, and that plaintiff was entitled to have said partnership dissolved, and a referee was appointed to state an account. This decree bears date May 2, 1889. Subsequently, January 9, 1891, plaintiff filed a supplemental complaint, bringing in

and making defendants George W. Burnett, the Humboldt Savings and Loan Society, and Patrick Cahill. In this supplemental complaint it is alleged, *inter alia*, that in 1884 McInerney conveyed to Burnett certain property, alleged to have been the property of the copartnership, to secure payment to Burnett of the sum of two thousand seven hundred and fifty-six dollars and ninety cents to redeem the land from foreclosure sales upon mortgages existing on the land when the same were purchased for the copartnership; and also that defendant McInerney in 1884, after the commencement of this action, assigned and conveyed to said Cahill, for the benefit of the creditors of McInerney, all the real and personal property of McInerney; that Cahill never filed an inventory or qualified as such assignee, and subsequently McInerney settled with his creditors. Burnett answered, admitting the conveyance, but denied that it was intended as a mortgage. Cahill also answered, admitting the conveyance to him, but alleging that McInerney was indebted to him, and demanded payment out of the interest of McInerney.

Later other supplemental complaints were filed charging that McInerney had conveyed since the commencement of the action other interests in the land, and, among others, that M. C. Hassett had acquired an interest by conveyance from McInerney, and that Hassett acquired such interest with full notice of the rights of plaintiff in respect to the land. Answers were interposed to these supplemental complaints, a trial had, findings made, and a decree was entered.

The first objection to the judgment is that the court erred in decreeing that plaintiff have and recover from Thomas McInerney and the other defendants an undivided one-half of the property (describing it). Supposing McInerney to be merely the trustee of plaintiff, this certainly was a very unusual form for a decree. The title was left in McInerney, but by the judgment plaintiff would be let into joint possession with the defendants. This is a proper form of a judgment in ejectment, but not in an action by a *cestui que trust* to get the title from his trustee. But the action was for a dissolution of a copartnership. In such case the real estate should be treated as personal property and sold to pay debts, if there are any, and the residue distributed. (*Coward v. Clanton*, 79 Cal. 23; *Bates v. Babcock*, 95 Cal. 479.¹)

In this case the property was distributed subject to several liens to secure partnership debts, and even subject to liens to secure the individual debts of each of the partners. Unless the parties consent to such a decree it should not be entered. To have their interests severed is itself a relief to which each partner is entitled.

But the court has no power to declare that certain debts, and especially costs, shall constitute liens upon the partnership property. If the costs or indebtedness was properly payable out of the partnership assets, the court could and should have caused a sale to be made of the assets, and could have ordered such claims paid from the proceeds; but a lien cannot be created by the court upon the partnership property or upon the portions assigned to the parties.

Cahill filed no cross-complaint. He asked for affirmative relief in his answer, but this was not served on McInerney, nor did McInerney answer it as a cross-complaint. No issue was made between Cahill and McInerney, and no judgment could have been rendered establishing as against McInerney a money demand.

Hassett, having been made a defendant by a supplemental complaint, answered admitting that he had acquired an interest in the property described in the complaint since the commencement of the action, but denied that plaintiff had any title to or interest in the property as partner or otherwise. In the findings the court finds that several judgments were rendered against McInerney under which execution sales were made; that Hassett succeeded to the interests of the purchasers, and that sheriff's deeds, in pursuance of the sales, were made to Hassett or his grantors. It does not find what interest Hassett has in the property, or whether he has any, but that he has none except "in the share or portion thereof belonging to the defendant McInerney." Supposing this to be intelligible language, it is yet a failure to define either the interest of Hassett or McInerney. In the decree, as stated, nothing is adjudged to either McInerney or Hassett. The plaintiff merely recovers from them and the other defendants an undivided one-half of the property. In the conclusion of the decree, however, it is provided, referring to a possible sale of the property and the payment of

certain demands, "if any money remains of the respective halves of the plaintiffs and defendants, the same shall be paid to them or their attorneys respectively." To what defendants or in what proportions is not stated. In short, the findings and decree are formed on the idea that the plaintiff is suing to recover specific property from the defendants, and not to obtain the dissolution of a partnership, the liquidation of its debts and the distribution of its assets.

The judgment in favor of Burnett is also erroneous, as it is not supported by the findings.

The judgment is reversed, and the cause remanded for a new trial.

Henshaw, J., and McFarland, J., concurred.

Hearing in Bank denied.

[Crim. No. 608. Department One.—June 23, 1900.]

THE PEOPLE, Respondent, v. D. E. ROACH, Appellant.

CRIMINAL LAW—ASSAULT WITH INTENT TO COMMIT RAPE—GIRL UNDER AGE OF CONSENT—FORCE AND CONSENT NOT INVOLVED.—Upon the trial of a defendant accused of an assault with intent to commit rape upon a young girl under the age of legal consent, neither the element of force nor the question of consent has any application. The prosecutrix could not consent, and the law resists for her.

Id.—INTENT OF DEFENDANT, HOW JUDGED.—The intent of the defendant is to be judged by his conduct, and not by the conduct of the prosecutrix.

Id.—EVIDENCE—DECLARATION OF DEFENDANT.—Evidence is admissible to prove a declaration of the defendant made shortly after the assault, which tended to cast some light upon his intent, and which had reference to his encounter with the prosecutrix.

APPEAL from a judgment of the Superior Court of Tuolumne County and from an order denying a new trial. G. W. Nicol, Judge.

The facts are stated in the opinion.

J. B. Curtin, for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

CHIPMAN, C.—Information for assault with intent to commit rape. The jury returned a verdict of guilty as charged in the information, and judgment was entered thereon that defendant be imprisoned at Folsom for the term of eight years. The appeal is from the judgment and from the order denying defendant's motion for a new trial.

1. It is contended that the verdict was contrary to the evidence. It appears that the alleged assault was upon a girl under the age of fourteen years and hence under the age of consent.

Defendant claims that the evidence fails to bring the case within the rule laid down in *People v. Fleming*, 94 Cal. 308, where it was said: "The assault must have been made with intent to commit rape notwithstanding all possible resistance that could be made. The intent must have been to perpetrate the crime at all events regardless of what the prosecutrix might or could do to prevent it." In that case the female was of the age of twenty-four years, and force was a necessary element of the crime, and so also was consent a question necessarily involved. In the present case neither the element of force nor the question of consent has any application. The prosecutrix could not consent, and the law resists for her. (*People v. Verdegreen*, 106 Cal. 211.¹) We must judge of defendant's intent by his conduct and not by that of his victim. There were certain unmentionable acts on his part which clearly showed his intent to have sexual intercourse with the girl, and from all the facts and circumstances we think it sufficiently appeared that his intent was to have carnal intercourse with the girl. If he had succeeded it would have been rape, with or without force and with or without her consent, and it must follow that as his intent was to violate the person of the girl, it constituted an assault with intent to commit rape.

In *People v. Courier*, 79 Mich. 366, the court said: "In cases of this kind it is not necessary that it should be shown,

¹ 46 Am. St. Rep. 234.

as in rape, that the accused intended to gratify his passion at all events. If he intended to have sexual intercourse with the child, and took steps looking toward such intercourse, and laid hands upon her for that purpose, although he did not mean to use any force, or to complete his attempt if it caused the child pain, and desisted from his attempt as soon as it hurt, he yet would be guilty of an assault with intent to commit the crime charged in the information."

In *State v. Sherman*, 106 Iowa, 684, an instruction was held good that charged that if the defendant asked or caused the child to lie down upon the ground and disarranged her clothing, for the purpose of having intercourse with her, it would constitute an assault, and if in addition the jury should find that it was defendant's intention in so doing to carnally know her, and she was then under the age of consent, and nothing further be shown, the defendant would be guilty of assault with intent to commit rape.

2. It is claimed that the court erred in overruling defendant's objection to the following question, and in refusing to strike out the answer thereto: "Q. What did you hear the defendant say, if anything?" The question related to what defendant said when she returned to the room for her clothing and just after she returned to her own room and was dressing. The answer was: "Well, he said I was a fool; if I had any sense I would stay there and make lots of money, because I was young, and people would naturally take me because I was young." This remark was made to her mother, who, it seems, was a disreputable character and had shown a disposition to help defendant in the accomplishment of his purpose in the early stage of his efforts, for she came into the bedroom while her daughter was struggling with defendant and told her to be quiet; that he wouldn't hurt her, and went out without giving her any assistance. The remark of defendant, now objected to, tended to cast some light on his intent in going to the room and manifestly had reference to the encounter he had just experienced with the girl, and was clearly admissible.

It is advised that the judgment and order be affirmed.

Cooper, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Van Dyke, J., Harrison, J., McFarland, J.

[L. A. No. 694. Department One.—June 23, 1900.]

R. Y. McBRIDE, Appellant, v. T. E. NEWLIN, County Clerk, etc., et al., Respondents.

INJUNCTION—TAXPAYER—ILLEGAL CLAIM AGAINST COUNTY FOR PRINTING.—A taxpayer cannot maintain an action to enjoin the board of supervisors from allowing an alleged illegal claim against the county for printing; nor can he in that action enjoin the auditor and treasurer from acting officially upon such claim.

ID.—QUASI JUDICIAL ACTION OF SUPERVISORS—PRESUMPTION.—The board of supervisors, in passing upon a claim against the county, acts in a *quasi* judicial capacity; and it must be presumed that the board will do its duty, and will reject the claim if it is illegal.

ID.—PLEADING—INSUFFICIENT ALLEGATIONS.—A complaint to enjoin the allowance and payment of an illegal claim for printing, which does not allege that any claim therefore has been made out or filed with the board of supervisors, or that any such claim will be presented, is fatally defective.

APPEAL from a judgment of the Superior Court of Los Angeles County. Waldo M. York, Judge.

The facts are stated in the opinion.

Hester & Ladd, for Appellant.

Flint & Barker, J. A. Donnell, District Attorney, and James C. Rives, Successor, for Respondents.

COOPER, C.—The court sustained a demurrer to the complaint, and judgment was entered for defendants. This appeal is from the judgment and for the purpose of reviewing the order sustaining the demurrer.

The action was brought by plaintiff, as a taxpayer, for the purpose of enjoining the board of supervisors of Los Angeles county from allowing or ordering a warrant drawn, the au-

ditor of the county from drawing the same, and the treasurer from paying any such warrant for a claim of defendants Pridham and Faulkner for printing a supplemental register of the county, which claim for printing is alleged to be illegal for certain reasons not necessary to be discussed in this opinion. The demurrer was properly sustained. The case is clearly within the rule laid down in *Linden v. Case*, 46 Cal. 172, and *Merriam v. Board of Supervisors*, 72 Cal. 519.

The board of supervisors, in passing upon a claim, act in a *quasi* judicial capacity. (*Colusa County v. Jarnett*, 55 Cal. 375; *McFarland v. McCowen*, 98 Cal. 331.) In the latter case the plaintiff presented an itemized bill against the county for services alleged to have been performed as constable, and the board of supervisors allowed the claim and ordered the warrant drawn. The defendant, as auditor, refused to pay the warrant and attempted to show that plaintiff never in fact performed any services for the county. This court held the adjudication of the board of supervisors, as to the fact of whether or not the services had been performed, final and conclusive. In the opinion it is said: "The claim of respondent for fees in payment of services as constable was one which the board of supervisors had jurisdiction to hear and determine." The board of supervisors, being the body clothed with *quasi* judicial functions, is the appropriate tribunal to pass upon the claim which it is alleged will be allowed. We must presume that the board will do its duty, and if the claim is illegal that it will be rejected. In order for the court to have issued an injunction in this case it would have to determine that a tribunal possessing judicial powers was intending to and would violate the law. If an injunction would lie in such case, on the same principle it would lie against the superior court in case it were alleged that such court intended to decide some case contrary to law.

The complaint is fatally defective in other respects. It is not alleged that any claim for said printing has been made out or filed with the board of supervisors, or that any such claim will be presented. The cases cited by appellant are not in conflict with what has here been said. In *Winn v. Shaw*, 87 Cal. 632, the action was for the purpose of restraining the auditor from drawing his warrant for the purchase price of

land which the board of supervisors had no power to purchase without publishing notice as required.

In *Bradford v. San Francisco*, 112 Cal. 537, the action was for the purpose, among other things, of enjoining the board of supervisors from incurring an indebtedness and levying a tax in violation of the County Government Act and in excess of the revenue provided for the fiscal year.

We advise that the judgment be affirmed.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Van Dyke, J., Harrison, J., McFarland, J.

[L. A. No. 634. Department One.—June 25, 1900.]

R. M. DOUGLASS, Respondent, v. B. E. WILLARD, Appellant.

QUIETING TITLE—PLEADING—EVIDENCE—PRIORITY OF REGISTRY—BURDEN OF PROOF—BONA FIDE PURCHASER—REOPENING CASE.—In an action to quiet title, where the complaint was in the usual form, and the defendant pleaded title, but neither party alleged the source of title, and plaintiff proved a *prima facie* title under execution and rested, whereupon the defendant proved a deed from the execution debtor made long prior to the sale under execution, but recorded after the certificate of sale and prior to the sheriff's deed, the burden of proof was shifted upon the plaintiff to show that he was a *bona fide* purchaser for value, without notice of defendant's deed, and the court had discretion to allow plaintiff to reopen his case, and make such proof.

ID.—SUFFICIENCY OF FINDINGS.—Findings that plaintiff purchased the premises for the sum of two hundred dollars, and paid the same amount therefor, and at the time had no notice, actual or constructive, that the premises had been before sold and conveyed to the defendant or to anyone, sufficiently show that plaintiff was a *bona fide* purchaser for a valuable consideration.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Lucien Shaw, Judge.

The facts are stated in the opinion.

William Fitzgerald, for Appellant.

E. W. Sargent, for Respondent.

HAYNES, C.—Action to quiet title. Findings and judgment were for the plaintiff, and the defendant appeals from the judgment and from an order denying a new trial.

The complaint was in the usual form, alleging that the plaintiff is the owner in fee simple of the described lot, that defendant claims an interest therein adverse to the plaintiff, and that her claim is without right, etc. The answer denied these allegations, and alleged that defendant was the owner in fee simple. Neither referred in any manner to the source of title under which they respectively claimed.

The plaintiff gave evidence showing a valid sale by a constable of the lot in question under a judgment rendered by a justice of the peace against J. H. Melvill, the plaintiff being the purchaser, that the certificate of sale was duly recorded on October 23, 1896, the execution of a deed to the plaintiff, and that the deed was recorded April 23, 1897. It was stipulated that the title to the lot in question was vested in said Melvill on February 26, 1889, and the plaintiff then rested.

The defendant introduced a deed executed by said Melvill to her on May 1, 1894, and recorded April 17, 1897, after the certificate of sale to the plaintiff was recorded, and six days before his deed was recorded, and the defendant then rested.

The plaintiff immediately moved the court to reopen the case and permit him to show that plaintiff was a purchaser for a valuable consideration and without notice that the defendant or any person other than said Melvill had any interest in said lot. This motion was granted over defendant's objection, and an exception was taken. The plaintiff thereupon introduced evidence tending to show that he was a *bona fide* purchaser in good faith, and without notice, and for a valuable consideration.

If it be conceded that plaintiff could not have introduced this evidence otherwise than by motion and leave of the court, it was clearly within the discretion of the court to grant it. After the defendant had introduced her deed, prior in date to that of plaintiff, the burden was then shifted to plaintiff to

show that his purchase was for value, without notice, and prior to the recording of the defendant's deed. (*Long v. Dollarhide*, 24 Cal. 218.)

It is only in cases of abuse of discretion that this court will interfere with an order of the lower court allowing additional evidence to be introduced by a party after he has once rested. It is contended that there is no finding that the plaintiff was a purchaser for a valuable consideration. It is found by the court that plaintiff purchased the premises for the sum of two hundred dollars and paid the said amount therefor, and at the time "had no notice, actual or constructive, that said J. H. Melvill had sold or conveyed said premises to the defendant E. E. Willard, or to any person." This certainly is a finding that plaintiff was a purchaser, and two hundred dollars is certainly a valuable consideration. (See *Forman v. Wallace*, 75 Cal. 552.)

This disposes of the only points urged in defendant's brief. We advise that the judgment and order be affirmed.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Van Dyke, J., McFarland, J.

[L. A. No. 696. Department One.—June 25, 1900.]

ADALINE SCHWIND, Respondent. v. HERBERT S. HALL et al., Defendants. CHARLES M. SHORT- RIDGE, Appellant.

FORECLOSURE OF MORTGAGE—PLEADING—NONPAYMENT OF NOTE INDORSED BEFORE MATURITY—SUPPORT OF JUDGMENT.—In an action to foreclose a mortgage by the indorsee of a note which was payable "on or before two years after date," with interest payable semi-annually, etc., where the complaint shows an indorsement and delivery by the payee to the plaintiff less than thirty days after the date of the note and continuous ownership of the note and mortgage by plaintiff thereafter, and alleges payment of the interest

for one year, and that the principal and interest thereafter accruing according to the terms of the note "still remains due and unpaid from the defendant [mortgagor] to this plaintiff," is sufficient to support a judgment for the plaintiff against the mortgagor.

ID.—DEMURRER FOR UNCERTAINTY—HARMLESS RULING—FAILURE TO PLEAD PAYMENT.—Where the mortgagor answered the complaint, but failed to plead payment as a defense, the overruling of a demurrer interposed by him to the complaint for uncertainty as to the allegation of nonpayment, in not alleging that the note was not paid by him to the payee before the indorsement to the plaintiff, nor by the payee as indorser, if erroneous, is harmless, and cannot prejudice any substantial right of the mortgagor.

ID.—POSSESSION OF NOTE PRIMA FACIE EVIDENCE OF NONPAYMENT.—The possession of the note by the payee, and by the plaintiff from the date of the indorsement, is *prima facie* evidence that it was not paid to either of them.

APPEAL from a judgment of the Superior Court of San Luis Obispo County. E. P. Unangst, Judge.

The note secured by the mortgage was dated March 27, 1895, and was for the sum of four thousand five hundred dollars, with interest thereon from date until payment, at the rate of eight per cent per annum, payable semi-annually, and, if not so paid, then to be added to and become part of the principal. The indorsement of the note and assignment of the mortgage was made by the payee to the plaintiff April 24, 1895, prior to the maturity of any payment of interest on the note. Further facts are stated in the opinion.

John E. Richards, and Samuel M. Shortridge, for Appellant.

The complaint is insufficient as against the demurrer. It is a well-settled rule of pleading that in an action brought to recover upon a promissory note, it is essential that the plaintiff should allege that the note has not been paid. (*Ryan v. Holliday*, 110 Cal. 335; *Notman v. Green*, 90 Cal. 172; *Scroufe v. Clay*, 71 Cal. 123; *Hurley v. Ryan*, 119 Cal. 71; *Bank of Shasta v. Boyd*, 99 Cal. 604.) It is also the well-established rule in this state that pleadings are to be construed most strongly against the pleader. (*Callahan v. Loughran*, 102 Cal. 476; *Glide v. Dwyer*, 83 Cal. 477; *Hays v. Steiger*, 76 Cal. 555; *Collins v. Townsend*, 58 Cal. 608.) No mere presumption of evidence upon the trial, from pos-

session of the note, can be indulged in favor of the pleader, who must definitely allege its nonpayment.

C. W. Cobb, Graves & Graves, and D. W. Burchard, for Respondent.

Possession and ownership of the note are averred both in the original payee, before the indorsement, and in the indorsee thereafter, and the law raises a presumption of nonpayment against the maker from such possession and ownership. (*Farmers' etc. Bank v. Christensen*, 51 Cal. 571; *Turner v. Turner*, 79 Cal. 565.) Under the facts of the case, any possible error in overruling the demurrer could not have substantially prejudiced the mortgagor, and cannot therefore be ground for reversal. (Code Civ. Proc., sec. 475; *Gassen v. Bower*, 72 Cal. 555; *Shale v. Sisson etc. Co.*, 115 Cal. 371; *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 686; *Smith v. Smith*, 119 Cal. 183; *Alexander v. Central Lumber Co.*, 104 Cal. 532.)

GRAY, C.—This is an action on a promissory note and to foreclose a mortgage executed by the appellant Shortridge to the defendant Herbert S. Hall, who indorsed and delivered said note and assigned said mortgage to plaintiff.

The defendants, other than Shortridge, made default. Shortridge demurred to the complaint for want of facts and on the ground that it was uncertain in its allegations as to nonpayment. On his demurrer being overruled he answered, and on a trial plaintiff obtained judgment against him, from which he appeals, and in support thereof relies solely on the insufficiency of the complaint. The complaint shows that the note was drawn payable "on or before two years after date," and that some twenty-seven days after its execution the defendant Hall "assigned said note by indorsing the same on the back thereof, and delivering the same to this plaintiff." The allegation of nonpayment of the note is as follows: "That interest was paid thereon to the twenty-seventh day of March, 1896; which said payments have been indorsed on the said promissory note, and the sum of four thousand five hundred dollars, United States gold coin, the principal sum in said promissory note and mortgage, together with interest thereon at the rate of eight per cent per annum, compounded as in said note provided, from the

twenty-seventh day of March, 1896, still remains due and unpaid from the said defendant, Charles M. Shortridge, to this plaintiff."

Appellant's contention is that the complaint fails to show that the note was not paid: 1. By the appellant to Hall while he was the payee and holder thereof; 2. By Hall to the plaintiff herein during the time that he was liable thereon as an indorser, and after said note became due.

The allegation of delivery of the note by Hall to plaintiff at the time it was indorsed, and that plaintiff was subsequently the owner and holder of it shows *prima facie* that the note had not been paid prior to such indorsement and delivery, for the possession of the note in the payee or indorsee is *prima facie* evidence that it has not been paid. (*Turner v. Turner*, 79 Cal. 565.) If the note had been paid by any person it would have operated as a discharge of it, and also of the mortgage, and appellant might have pleaded such payment as a defense to the action. He did nothing of the kind, though he further defended the action. Therefore, it is not unreasonable to presume that he had no such defense, and that he was in no way misled or otherwise injured by the action of the court in overruling his demurrer. This case should be distinguished from such cases as *Ryan v. Holliday*, 110 Cal. 335, and other cases cited by appellant, in which there was an entire absence of any allegation in the complaint as to nonpayment. The most that can be said against the complaint herein is that it is not as clear and certain as it should have been in its allegation showing a breach of the contract sued on. It contains, however, in addition to other allegations tending to show nonpayment of the note, a clear statement that the principal and part of the interest on the note is unpaid to the plaintiff by the one from whom it is primarily due. We think the complaint sufficient to support the judgment against this appellant, and if the court erred in overruling the demurrer such error should be disregarded because it did not mislead defendant, was merely technical in its character, and was in no way prejudicial to any substantial right of defendant. (*Gassen v. Bower*, 72 Cal. 555; *Holland v. McDade*, 125 Cal. 353.)

We advise that the judgment be affirmed.

Cooper, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Harrison, J., Van Dyke, J., McFarland, J.

[L. A. No. 650. Department Two.—June 25, 1900.]

D. W. FIELD, Appellant, v. JOHN BURR, Sheriff, etc.,
Defendant. CAROLINE KOSTER, Intervenor and
Respondent.

FINDINGS—IMMATERIAL VARIANCE—JUDGMENT.—Where the findings of fact are full and explicit, a judgment entered thereon in favor of and intervenor will not be reversed merely because in the conclusions of law the word "plaintiff" is inadvertently used for "intervenor."

APPEAL from a judgment of the Superior Court of Los Angeles County. Lucien Shaw, Judge.

The facts are stated in the opinion.

Mulford & Pollard, for Appellant.

W. J. Variel, for Defendant.

E. E. Powers, for Intervenor and Respondent.

SMITH, C.—Appeal from a judgment for intervenor in a suit for the recovery of personal property levied upon by defendant, as sheriff, under attachment in favor of plaintiff against third party.

The findings are unusually full and explicit, but in the conclusions of law the word "plaintiff" is inadvertently used for "intervenor," which is the ground urged for reversal. (*Dougherty v. Ward*, 89 Cal. 81.)

We recommend that the judgment be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

McFarland, J., Temple, J., Henshaw, J.

[L. A. No. 667. Department Two.—June 25, 1900.]

JOHN H. WISE, Appellant, v. S. D. BALLOU, Respondent.

APPEAL—FINDINGS—SUFFICIENCY OF EVIDENCE—NEW TRIAL—JUDGMENT.—Upon appeals from a judgment and from an order denying a motion for a new trial, neither of which is taken within sixty days after the denial of the motion, the appeal from the order will be dismissed, and the question of the sufficiency of the evidence to justify the findings and decisions cannot be considered.

APPEAL from a judgment of the Superior Court of San Luis Obispo County and from an order denying a new trial. E. P. Unangst, Judge.

The facts are stated in the opinion.

Graves & Graves, for Appellant.

F. A. Dorn, for Respondent.

HAYNES, C.—Claim and delivery to recover possession of five hundred sacks of wheat, or their value. The defendant had judgment and the plaintiff appeals therefrom and from an order denying his motion for a new trial.

The only point made by appellant and upon which he rests his case is that the evidence is insufficient to justify the decision.

Respondent makes the point that the sufficiency of the evidence to justify the findings and decision cannot be considered, because the appeal was taken more than sixty days after the entry of the judgment, and more than sixty days after the order denying a new trial.

The judgment was entered February 11, 1898, the order denying a new trial was made July 2, 1898, and the notice of appeal was filed and served September 1, 1898, sixty-one days after the order was entered.

As there is a bill of exceptions in the record, errors of law occurring upon the trial or appearing upon the judgment-roll might be considered upon this appeal, but it is

conceded there are none; and the appeal not having been taken within sixty days after the motion for new trial was denied, the question as to the insufficiency of the evidence cannot be considered. (Code Civ. Proc., sec. 939, subds. 1, 3.) The appeal from the order should therefore be dismissed, and the judgment affirmed.

Gray, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the appeal from the order is dismissed and the judgment affirmed.

Henshaw, J., McFarland, J., Temple, J.

[Sac. No. 685. Department Two.—June 25, 1900.]

J. P. FOGARTY, Appellant, v. JOHN FOGARTY, Respondent.

WATER RIGHTS—EXECUTED ORAL AGREEMENT—EASEMENT FOR PIPE—

USER OF WATER—FINDING AGAINST EVIDENCE.—In an action involving a water right, when the evidence showed that plaintiff's predecessor had, by an executed oral agreement with defendant's predecessor, and for a valuable consideration acquired an equitable title to the flow of water upon his land through a pipe connected with a tank on defendant's land, which was supplied with running water from a spring, and had by five years' user of the right agreed upon acquired the legal title to the easement for his pipe, and to the use of the water flowing from an orifice near the surface of the tank, to the extent agreed upon, a finding that defendants are entitled to the whole of the stream of water flowing from the spring is against the evidence.

ID.—PRESUMPTION OF USER UNDER AGREEMENT.—In the absence of evidence to the contrary, it must be conclusively presumed that the subsequent user of the right agreed upon was under the agreement, and therefore adverse as of right.

ID.—PRESCRIPTIVE TITLE—PLEADING—FINDINGS—CONJUNCTIVE DENIALS.

Where the complaint alleged ownership in the plaintiff of the whole of the water flowing from the spring and also pleaded a prescriptive title thereto under allegations that for more than five years, "plaintiff and his grantors have had the continuous, exclusive, uninterrupted, peaceable, notorious, and adverse use, enjoyment, and possession of the said water against defendant and all others, with the knowledge of all," etc., conjunctive denials of such allegations

in the answer and in the findings are improper; and notwithstanding the form of the denials of the answer may have been waived at the trial, the form of the findings is not sufficient to negative the claim of adverse user.

ID.—SUFFICIENCY OF ADVERSE USER—CLAIM OF RIGHT—KNOWLEDGE OF ADVERSE PARTY.—All that is necessary to make a user of water adverse is a claim of right in the party using it, and knowledge of the adverse party. The user of the water might be adverse, without being open or notorious.

ID.—DECAY OF TANK—USER FROM SPRING—CONSENT OF CLAIMANT—SUCCESSION OF TITLE—RIGHT OF RECOVERY.—Where the tank with which plaintiff's pipe was connected became decayed, and a subsequent claimant of defendant's land, being defendant's immediate grantor, declined to allow the rebuilding of the tank at joint expense, and declared that he had then no use for the water, and plaintiff's grantor, by consent of such claimant, connected his pipe directly with the pipe from the spring so as to take all of the water therefrom, which was so used continuously by plaintiff and his grantor for eight years, plaintiff's right of use of the whole of the water flowing in the pipe from the spring is good against all of the world, except the successors in interest of the owner who agreed with the plaintiff's grantor as to the limited right of user from the tank; and, if the defendant does not establish succession of his title from such owner, plaintiff is entitled to recover as against him.

APPEAL—ORDER DENYING NEW TRIAL—INSUFFICIENCY OF FINDINGS.—

Upon an appeal from an order denying a new trial, an objection to the sufficiency of the findings cannot be urged as a ground for reversal, and can only be considered as advisory in relation to further proceedings in the cause, upon reversal of the order.

APPEAL from an order of the Superior Court of Nevada County denying a new trial. F. T. Nilon, Judge.

The facts are stated in the opinion.

Thomas S. Ford, for Appellant.

J. M. Walling, for Respondent.

SMITH, C.—The suit was brought to enjoin the defendant from diverting water flowing in a pipe to the land of the plaintiff, and to quiet plaintiff's title to the same. The judgment was for the defendant, and the appeal is from an order denying a new trial.

The plaintiff is the owner of a piece of ground known as the Doyle place, which for many years has been supplied

with water by means of an iron pipe conveying water thereto from a spring on a place known as the Thomas rancho, which is the water in controversy; and one of the allegations of the complaint is "that the plaintiff and his predecessors in title are, and have been for six years and over last past continuously, the owners of . . . the said stream of water." This allegation is denied in the answer.

There is no direct finding on the issue thus raised; but it is found that the water was appropriated many years ago by the then owners of the lot now owned by the defendant, and known as the Thompson lot—"the predecessors in interest of defendant" therein; and "that ever since the appropriation of said water defendant and his grantors have been the owners . . . thereof." But this finding—which may be regarded as inferentially finding against the plaintiff on the issue raised by his allegation of ownership—cannot be sustained; for it appears from the evidence that the plaintiff has a clearly defined legal interest in the water right in controversy, which, to the extent of the right, entitled him to a finding in his favor.

The evidence on this point is contained in the deposition of Thompson—read in evidence by defendant—who, prior to the year 1869, was the owner of the Thompson lot. The water in question had, prior to his coming, been diverted from the Thomas place to the Thompson lot by means of a half-inch lead pipe, and was then, and for many years afterward, collected in a tank on the lot. Under these circumstances, Thompson entered into an agreement with one Quinn—the then owner of the Doyle place, and predecessor in title of plaintiff—under and in accordance with which Quinn replaced the half-inch pipe leading from the Thomas ranch to the tank on the Thompson lot with a one-inch pipe, and laid the half-inch pipe, from the tank to his house on the Doyle place. The pipe was connected with the tank about six inches from the top; and it was agreed that Quinn was to have the surplus water from the tank. Under this arrangement the water flowing through the Quinn pipe was continuously used by him and the succeeding owners of the Doyle place until 1890. In that year the tank had become rotten and decayed, and one Allen, the grantor of the defendant, who claimed to be the owner of the Thompson lot, was applied to by Doyle, the then owner of the Doyle place,

to pay half the expense of rebuilding the tank, but declined to do so, having no use for the water at that time. Thereupon Doyle, with the consent of Allen, connected his pipe directly with the pipe leading from the spring to the Thompson lot; and he and his successors in title continued to use all the water on the Doyle place until March, 1898, when the water was diverted by the defendant, to whom Allen had conveyed February 4, 1898.

Under the agreement between Thompson and Quinn it cannot be doubted that the latter acquired an equitable right to the use of the water to the extent agreed upon—that is, to the surplus water not used by Thompson, or, what is the same, to all the water flowing through the orifice in the tank about six inches from the top. The agreement was indeed merely oral, but it was for a valuable consideration, and was in fact carried into execution. It was, therefore, a valid agreement, conveying to Quinn a complete equitable title to the easement for his pipe and to the use of the water as agreed; which could at any time have been enforced by an action for specific performance, and which, pending such enforcement, was equivalent for all purposes of defense, to the legal title. (*Love v. Watkins*, 40 Cal. 547¹; *Luco v. De Toro*, 91 Cal. 405.) So, also—in the absence of evidence to the contrary—it must be conclusively presumed that the subsequent user of the right agreed upon was under the agreement, and, therefor, “adverse, or as of right” (Washburn on Easements, 152 [86]); and thus at the end of five years Quinn or his successor acquired the legal title to the easement, and became, to the extent of the interest agreed upon, the owner of the right. (Jones on Easements, secs. 179, 182; Washburn on Easements, 154 [88, 89].) The finding negatives this right, and hence cannot be sustained.

There are other points in the case, but these it will be necessary to consider only in so far as they may effect the further proceedings.

The real controversy intended between the parties relates, not to the use of the surplus water, under the agreement between Thompson and Quinn, prior to the rotting away of the tank in 1890, but to the claim of the plaintiff that, since then, he has acquired, by adverse user, a right to all the water.

¹ 6 Am. Rep. 624.

The allegations of the complaint on this point are that "during that period (i. e., 'for six years and over last past') plaintiff and his grantors have had the continuous, exclusive, uninterrupted, peaceable, notorious, and adverse use, enjoyment, and possession of the said water against defendant, and all others, with the knowledge of all, by appropriation, use, and under claim of right, and (that) during all of said time the said plaintiff appropriated said waters to a useful purpose." These allegations are denied in the answer substantially in the language of the complaint, and conjunctively only; and on familiar principles we would have to regard these denials (if not cured by failure to object to their sufficiency) as insufficient to raise an issue. (Deering's Code Civ. Proc., sec. 437, p. 181, note; 3 Deering's California Digest, tit. "Pleading and Practice," p. 2246, par. 250 et seq.) But as no objection was made on this account, and the parties went to trial as though the proper issues had been made, the objection to the sufficiency of the answer may, perhaps, be regarded as waived.

But the finding on this point is also open to a similar objection. It is that neither the plaintiff nor his grantors "have had the open, notorious, adverse use of said water for the period of five years as against the defendant or his grantors." But as all that is necessary to make a use adverse is a claim of right in the party using it, and knowledge of the claim in the adverse party, the use of the water might be adverse without being open or notorious. The finding, therefore, does not negative the plaintiff's claim of adverse use. But as the appeal is from the order denying a new trial, on the sole ground of insufficiency of evidence, this objection to the sufficiency of the finding cannot be used as ground of reversal. It is alluded to merely for the purpose of directing the court and parties in the further proceedings in the case.

With the same view, a further observation must be made. The plaintiff's right to the use of all the water flowing in the pipe is good against all the world except as against the successors in interest of Thompson. Hence, unless the defendant is shown to be such successor, the plaintiff must recover. On this point there is no evidence appearing in the bill of exceptions to connect Allen, the defendant's grantor, with Thompson. In the findings, indeed, the original

appropriators of the water are spoken of as the "predecessors in interest of the defendant," and Thompson himself as "one of defendant's grantors"—meaning predecessors in title; and this, in the absence of any specifications directed at these findings, may, perhaps, be regarded as a sufficient finding of the acquisition of Thompson's title to the water by the defendant; or, at all events, the sufficiency of the findings in this respect cannot be considered on this appeal. But on a new trial the question will become of importance.

We therefore advise that the order denying a new trial be reversed, and the cause remanded for further proceedings.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the order denying a new trial is reversed and the cause remanded for further proceedings.

Temple, J., McFarland, J., Henshaw, J.

[S. F. No. 1431. Department Two.—June 25, 1900.]

M. J. FONTANA et al., Respondents, v. PACIFIC CAN
COMPANY, Appellant.

UNSEALED CONTRACT OF CORPORATION—EVIDENCE—EXECUTION AND AUTHORITY OF OFFICERS UNPROVED.—A contract purporting to be executed in the name of a corporation by its president and secretary, but not bearing the corporate seal, is not admissible in evidence against the corporation, in the absence of proof of the genuineness of the signatures of the officers, and that they were authorized to execute the contract on behalf of the corporation.

ID.—CONTRACT RELATING TO STOCK—SEAL UPON CERTIFICATES.—The fact that he unsealed contract related to the transfer of stock of the corporation, the certificates of which were under seal, is immaterial, and cannot tend to show that the unsealed contract was sealed, or was authorized by the corporation.

ID.—ACTION UPON CONTRACT—MOTION FOR NONSUIT—GENERAL STATEMENT OF GROUNDS—INCURABLE DEFECTS—INAPPLICABLE RULE.—In an action upon such contract, a motion for nonsuit, stating generally "that no valid contract between the parties has been offered in evidence, and no proof has been made showing the plaintiff is en-

titled to any judgment as against the defendant," though not sufficiently specific to bring it within the ordinary rule applicable to such motion, is not within that rule, where it appears that the defects of plaintiff's case are incurable, if they had been specifically pointed out. It appearing that there was utter failure to prove authority for the contract, and that, under a proper construction of the contract, the plaintiff had no cause of action, the motion for non-suit should have been granted.

ID.—CONSTRUCTION OF CONTRACT—OPTION TO PURCHASE STOCK OR TO RESCIND—GUARANTY OF DIVIDENDS.—A conditional contract for the transfer of stock by a corporation to a partnership in consideration of its note at six per cent providing for an option to pay the note and take the stock from escrow before a fixed date, or to rescind the contract on or before such date and guaranteeing dividends on the stock to the firm from the date of the contract, and to make good to the firm all deficiencies below ten per cent per annum, and, if none are paid, to pay the firm ten per cent per annum on the amount of the note from date until rescission, is to be construed as providing not for annual dividends, and for treating each year as separate, but that the total dividends declared while the contract is to run shall amount to ten per cent per annum.

ID.—ELECTION TO RESCIND—FULFILLMENT OF GUARANTY—NO CAUSE OF ACTION.—Where the firm elected to rescind the contract, and, at the time of rescission, the total dividends declared exceeded ten per cent on the amount of the note, after deducting the interest thereon, the firm has no cause of action against the corporation.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. W. R. Daingerfield, Judge.

The facts are stated in the opinion.

Olney & Olney, for Appellant.

Napthaly, Freidenrich & Ackerman, for Respondents.

CHIPMAN, C.—Plaintiffs sued to recover a balance due upon the following contract alleged to have been entered into by plaintiffs and defendant on the day of its date:

"Agreement between the Pacific Can Company and Fontana & Co., both of the city and county of San Francisco.

"That the former shall sell to the latter two hundred and fifty (250) shares of the capital stock of the Pacific Can Company, at two hundred (200.00) dollars per share. Payment to be made by the latter's note for fifty thousand (50,000) dollars, one day after date, with interest at six per cent per annum.

"Both stock and note to be placed in escrow at the Anglo-California Bank, subject to the following conditions:

"Said Fontana & Co. may take up said note with accrued interest and receive said stock in satisfaction thereof at any date prior to February 1, 1896, or they may require that said note be returned to them provided said stock be returned to the Pacific Can Company at any date before February 1, 1896, interest on said note being paid to the date of said return.

"Said Pacific Can Company agree that all dividends declared on said stock up to either of the above dates shall be paid to said Fontana & Co., and that said Pacific Can Company will make good to Fontana & Co. any deficiencies in said dividends below ten (10) per cent per annum. Should there be no dividends paid, then the Pacific Can Company agree to pay Fontana & Co. ten per cent interest on the amount of the note from the time of the purchase of the stock until the cancellation of the note and the return of the shares.

"Said stock shall be returned to said Pacific Can Company and said note to Fontana & Co. on February 1, 1896, under the above conditions as to interest and dividends if the latter should not previously assume ownership in either way above provided.

"Signed in triplicate.

"San Francisco, April 25, 1894.

"PACIFIC CAN COMPANY,

"By JOHN LEE, President,

"A. D. CUTLER, Secretary.

"FONTANA & CO."

Defendant denied specifically the allegations of the verified complaint and set up a cause of action for damages against plaintiffs on account of an alleged agreement on their part to purchase cans for the year 1895 from defendant. Plaintiffs purchased no cans from defendant for that year. The court found against defendant on this issue, and as the evidence was conflicting defendant does not urge the claim here. The court found that the contract of April 25, 1894, "was executed on behalf of defendant by its president and secretary, and the execution of said contract by said officers was not without authority of its board of directors, and was not without authority

of law. Said contract was duly made and executed by said corporation." This finding is attacked as unsupported by the evidence, the defendant claiming in its answer and at the trial that the contract was unauthorized and void. Plaintiffs had judgment for two thousand four hundred and fifty-eight dollars and thirty-five cents, with interest at seven per cent per annum from February 1, 1896. Defendant appeals from the judgment, and brings the evidence up by bill of exceptions.

Plaintiff offered in evidence the contract sued upon, which is set out *supra*. The record reads as follows: "Said document [the contract] was not under the seal of the corporation. The witness testified that there were three originals of said document, and that the one shown here was one of the originals. Thereupon the counsel for the plaintiff offered it in evidence." Defendant objected on the following grounds: That the corporation had no authority to execute any such contract; that upon its face it appears to be *ultra vires*; that it is contrary to public policy and void; that it does not purport to be executed by the corporation in this, that it is not under the seal of the corporation, and there is no proof yet that the signatures of the officers are their genuine signatures, nor that they were authorized to make the contract. The objections were overruled and the contract was admitted in evidence, defendant reserving an exception. Plaintiffs cite in support of the ruling *Pixley v. Western etc. R. R. Co.*, 33 Cal. 183¹; and *Crowley v. Genesee etc. Co.*, 55 Cal. 273. Plaintiffs do not claim that there was any evidence, and there was none, showing that the directors of the corporation had, by resolution or by any other action, official or otherwise, authorized the president and secretary to make the contract; there is no evidence that either of these officers was clothed with general or special powers to make such a contract, or had any powers from which it might be inferred that they or either of them could make such a contract; there was no corporate seal attached. there is no evidence or claim of subsequent ratification by the directors of the corporation. The *Pixley* case is not authority for the broad proposition that the partial execution of a contract by a corporation raises the presumption of authority to make it. The presumption in that case arose from the estab-

¹ 91 Am. Dec. 623.

lished acts of the directors of the corporation, as well as from the part execution of the contract. In the case here there is no evidence that the directors ever knew of the contract, much less authorized it by their conduct or acts. Nor does it follow, as is claimed, that the contract was under seal because it was executed and because the certificate of the shares issued under the contract was under seal. It is affirmatively shown that the contract bears no seal of the corporation, and its absence is not accounted for in any way. The seal on the certificate of shares is not the slightest evidence that a seal was attached to the contract. Besides, whatever presumption arose that the seal was attached was overcome by the admission that in fact no seal was attached. The principle decided in the Crowley case has since been approved and is not now questioned. But in that case it was admitted that the president of the corporation, who made the contract, was also superintendent and general managing agent of the mining corporation, and it was held that authority may be inferred from the admitted relations of the agent to the corporation, or from its course of business. No such facts appear here. We do not think the finding is supported by the evidence. (*Barney v. Pforr*, 117 Cal. 56; *Pauly v. Pauly*, 107 Cal. 82; *Blood v. La Serena Land etc. Co.*, 113 Cal. 221.)

At the close of plaintiff's case defendant made a motion for nonsuit on grounds which, in our opinion, would not ordinarily have been sufficiently specific to bring it within the well-established rule as stated in *Daley v. Russ*, 86 Cal. 114, and cases there cited. (See, also, *Palmer v. Marysville etc. Pub. Co.*, 90 Cal. 168.) The rule, however, does not apply if the case is one that cannot be cured although attention be specifically called to the defects. (*Daley v. Russ*, *supra*.) Aside from the failure to make the proof of authority, we think the contract on which plaintiffs relied gave them no cause of action, and for this reason the motion for nonsuit should have been granted.

The court found that defendant paid plaintiffs a dividend of twenty-five dollars per share on two hundred and fifty shares November 1, 1894, amounting to six thousand two hundred and fifty dollars. Plaintiffs' contention is, and the trial court so construed the contract, that defendant agreed to

guarantee a dividend of not less than ten per cent per annum, and to pay all dividends in excess of that amount, that the first dividend was paid during the first year and plaintiffs were entitled to all of it, less six per cent interest to be paid defendant on the note; that there being no dividend declared the second year the guaranty was to pay ten per cent for that year, regardless of the dividend already paid, and up to February 1, 1896, less interest on the note. We cannot so construe the contract. There was no guaranty that dividends should be declared once a year, or at any stated periods. The agreement was that "all dividends . . . shall be paid to said Fontana & Co., and that said Pacific Can Company will make good to Fontana & Co. any deficiencies in said dividends (i. e., in such dividends as should be declared) below ten per cent per annum." This meant that for the period the contract was to run the dividends should amount to ten per cent per annum. This construction, it seems to us, is strengthened by what follows, to wit: "Should there be no dividends paid, then the Pacific Can Company agrees to pay Fontana & Co. ten per cent interest on the amount of the note from the time of the purchase of the stock until the cancellation of the note and the return of the shares." Simply stated, defendant agreed that in any event plaintiff should receive all dividends, no matter how large, and if no dividend was declared plaintiffs should receive the equivalent of ten per cent per annum on the amount of the note, less six per cent, or four per cent net. It is altogether probable that defendant understood the contract as to the purchase of cans to be that plaintiffs were to buy cans from defendant for the year 1895 as well as for 1894, otherwise there would seem to have been no reason for making the contract run to February 1, 1896, and there was evidence tending to show this to be the contract. There was evidence to the contrary, however, which the trial court adopted, and the finding as to this fact cannot be questioned here. But this view of the evidence taken by the court did not warrant it in finding the contract now before us to mean something different from its obvious import. To illustrate: Suppose no dividends whatever had been declared, what would have been the measure of plaintiffs' right to recover? Clearly, ten per cent per annum, less six per cent per annum to be paid defendant for the period of the contract. Suppose

the dividend declared had occurred at the end of the period instead of November 1, 1894, what would have been the rule of adjustment? Plaintiff would have been entitled to the dividend, much or little, and if in the aggregate it was less than ten per cent, after deducting six per cent, defendant would have been obliged to make good the deficiency; if more, plaintiff would be entitled to retain all of it, and the obligations of the parties would stand discharged so far as concerned dividends and interest. It will be observed that defendant's liability to make good any deficiencies in dividends did not accrue until the termination of the contract, for the deficiencies could not sooner be ascertained. The fundamental error of plaintiffs' contention lies in the assumption that the contract contemplated and provided for annual dividends and that each year must be treated separately.

Plaintiff terminated the contract by notice January 23, 1896—one year and nine months (lacking two days) from its date. The guaranty of ten per cent for this period amounted to eight thousand seven hundred and fifty dollars, and the interest, at six per cent, amounted to five thousand two hundred and fifty dollars, leaving a deficiency of three thousand five hundred dollars. The dividend paid was six thousand two hundred and fifty dollars, so that plaintiffs received two thousand seven hundred and fifty dollars more than the stipulated deficiency. The court found that plaintiffs were entitled to judgment for two thousand seven hundred and ninety-six dollars and sixty-six cents. We can discover no warrant for the finding or the judgment. The judgment should be reversed.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed.

Temple, J., McFarland, J., Henshaw, J.

[L. A. No. 672. Department Two.—June 25, 1900.]

J. W. SMITH et al., Respondents, v. STEARNS RANCHO
COMPANY et al., Appellants.

INJUNCTION—AMENDED COMPLAINT—AFFIDAVIT—CONSTRUCTION OF CODE.

Under section 527 of the Code of Civil Procedure, providing that "the injunction may be granted at the time of issuing the summons upon the complaint, and at any time afterward before judgment upon affidavits," it cannot be objected that the court was without jurisdiction to grant an injunction upon a verified amended complaint, which is an affidavit, and may be used as such.

ID.—WATER RIGHTS—DISTRIBUTION FROM CANAL—INVALID ASSESSMENTS—RESTRAINING INTERFERENCE—PLEADING.

In an action by the owners of land planted to fruit trees, a complaint showing their right to the distribution and delivery of water from a canal, for necessary irrigation of their trees, which would die without it, and seeking to enjoin the canal company from interfering therewith, which it is alleged they are threatening to do, the plaintiffs' irreparable injury, for nonpayment of assessments for items specified therein, and alleged not to be proper charges for maintaining or repairing the canal, and averring readiness to pay such portion of the assessments as may be found due, sufficiently shows that the damages from the threatened injury would be irreparable, and is not objectionable for not stating the quantity of water owned by the plaintiffs, or for not sufficiently showing the wrongfulness of defendant's claims, or the relative rights of the parties.

ID.—JOINDER OF PARTIES PLAINTIFF—TENANCY IN COMMON.—The plaintiffs were entitled to sue together, as being tenants in common of the ditch, notwithstanding their several ownership of lands and of right of irrigation thereof.

ID.—GROUNDS OF INJUNCTION—IMMATERIAL OBJECTIONS.—Where the grounds of the injunction were that plaintiffs were part owners of the canal, and that defendant threatened to deprive them of the use of it, the other objections urged to the complaint are immaterial.

APPEAL from an order of the Superior Court of Riverside County refusing to dissolve an injunction. J. S. Noyes, Judge.

The facts are stated in the opinion.

E. W. McGraw, Shirley Ward, and Frank D. Lewis for Appellants.

The complaint does not show irreparable injury. (*Branch Turnpike Co. v. Yuba County*, 13 Cal. 190; *Richards v. Kirkpatrick*, 53 Cal. 433.) There is no sufficient segregation of improper charges or tender of the proper charges. (*Esterbrook v. O'Brien*, 98 Cal. 671.) He who seeks equity must do equity. (Pomeroy's Equity Jurisprudence, secs. 385, 391, 937; *Hughes v. Davis*, 40 Cal. 117; *Burham v. San Francisco Fuse Co.*, 76 Cal. 26.) The complaint does not state the amount of water owned by plaintiffs. The relative rights of the parties are not shown, and there is a misjoinder of parties plaintiff. The court was without jurisdiction to grant the injunction on the amended complaint. (Code Civ. Proc., sec. 527.)

Purington & Adair, and John G. North, for Respondents.

The amended complaint was a sufficient affidavit, and may be read as such on application for an injunction. (*Atchison v. Bartholow*, 4 Kan. 124; *Howard v. Eddy*, 56 Kan. 498, and cases cited; 2 Century Digest, 6.) The destruction of plaintiffs' fruit trees as the result of the threatened acts of the defendants shows irreparable injury. (High on Injunctions, sec. 727; *Daubenspeck v. Grear*, 18 Cal. 444.) No old payment was required to be tendered to prevent the shutting off of the water supply. (*Wood v. Auburn*, 87 Me. 287.) The allegation of readiness and willingness to pay claims settled by the court was sufficient. (*Penny v. Rosendale Union Car Co.*, 4 Am. & Eng. Corp. Cas. 71; 10 Ency. of Pl. & Pr. 933, 936.) It is only a claim admitted to be justly due that is required to be tendered before suit. (1 High on Injunctions, sec. 497.) When there is a controversy as to the indebtedness, and at least something of an overcharge, injunction will lie to prevent the cutting off of supply. (*Sickles v. Manhattan etc. Co.*, 66 How. Pr. 314.) The plaintiffs were entitled to sue together as tenants in common. (Code Civ. Proc., sec. 384; *Foreman v. Boyle*, 88 Cal. 290; *Churchill v. Lauer*, 84 Cal. 233.)

SMITH, C.—Appeal from an order denying defendant's motion to dissolve an injunction *pendente lite* restraining defendant "from stopping the flow in the North Riverside and Jurupa canal of the water of the hereinafter named persons and plaintiffs, and from interfering in any way with the dis-

tribution and delivery of the said water to the said persons, and from in any way preventing the said persons from turning into the said canal and conveying there through and recovering therefrom their said water, the same being the number of inches of said water, measured under a four-inch pressure, hereinafter set opposite the names of said persons and plaintiffs respectively."

There is attached to the order a list of the plaintiffs, fifty-five in number, with the amount of water pertaining to each opposite their names respectively—the whole aggregating two hundred and forty-two inches.

The case comes up on a bill of exceptions, in which it is stated that the papers used on the hearing of the motion consisted of the amended complaint, order of injunction, and motion to dissolve, which are set out in the bill.

The facts on which the injunction was granted, as they appear in the second count of the amended complaint, were substantially as follows: Each of the plaintiffs is the owner of certain water flowing in the county of San Bernardino, and of a certain undivided share of the canal known as the North Riverside and Jurupa canal, and of the carrying capacity therein and of the right to carry water therethrough. The plaintiffs own lands in San Bernardino county planted to fruit trees, etc., and irrigated with the water belonging to them as aforesaid, which is conducted to the lands by means of the canal, and have no other means of irrigating the same; and without the use of these means their trees will die, etc.

The defendants claim the right to control and operate the canal, and to collect from plaintiffs certain assessments solely for the necessary expenses of maintaining and repairing the canal; and claim that certain assessments are due from the plaintiffs, and threaten to prevent the water of the plaintiffs from flowing in said canal for nonpayment of the assessments, which, it is alleged, would result in great and irreparable injury to them.

The assessments made by the defendant include numerous items, specified in the complaint and alleged not to be proper charges for maintaining or repairing the canal, and it is alleged that there are others of the same character which the plaintiffs are unable to specify; and plaintiffs aver that

they are ready to pay such portion of the assessments as may be adjudged to be a lawful charge, etc.

It is objected by the appellants' counsel that the injunction was granted after issuing of summons upon the amended complaint alone, and that the court was therefore without jurisdiction to grant it. The objection rests upon the language of section 527 of the Code of Civil Procedure, which is that "the injunction may be granted at the time of issuing the summons upon the complaint, and at any time afterward before judgment upon affidavits."

Whether the injunction was granted before or after the issuing of summons does not appear on the record; but, waiving this, it is a sufficient answer to the objection to say that the amended complaint was itself an affidavit, and there is no reason that it should not have been used as such. (*Falkinburg v. Lucy*, 35 Cal. 52¹; *Delger v. Johnson*, 44 Cal. 182; *Hiller v. Collins*, 63 Cal. 237; *High on Injunctions*, secs. 1574, 1577, 1587, 1604; *Howard v. Eddy*, 56 Kan. 498.)

It is further objected that the complaint does not state the quantity of water owned by the plaintiffs; that it does not appear that the defendant's alleged claims are not rightful; that the relative rights of the parties in the subject matter cannot be determined from the complaint; that there are no facts stated which confine the right of the defendants to levy assessments to the cost of operating the canal; and it does not appear that plaintiffs would suffer irreparable damages; that it is conceded that part of the assessments are correct, and that there is a misjoinder of parties plaintiff. But these objections are all manifestly untenable.

The plaintiffs were tenants in common of the ditch, and as such were entitled to sue together. (Code Civ. Proc., sec. 381.) It is sufficiently alleged that the damages from the threatened injury would be irreparable. The other objections do not touch the grounds on which the injunction was granted; which were simply that the plaintiffs were part owners of the canal, and that defendant threatened to deprive them of the use of it, etc. It was therefore unnecessary to specify the quantity of water owned by the plaintiffs.

We therefore advise that the order appealed from be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is affirmed.

Temple, J., McFarland, J., Henshaw, J.

[L. A. No. 707. Department Two.—June 25, 1900.]

L. W. BLINN LUMBER COMPANY, Appellants v. JAMES W. WALKER et al., Respondents.

MECHANICS' LIEN—CONTRACTOR FULLY PAID—VALID CONTRACT.—Where the contractor has been fully paid according to the terms of a valid building contract, no mechanics' liens can be enforced against the owner of the building.

ID.—SUFFICIENCY OF MEMORANDUM OF CONTRACT.—Where the original contract consisted of three parts, each signed by the parties, consisting of the agreement, the specifications, and the plans and drawings, a memorandum thereof, consisting of a verbatim copy of the contract and signatures thereto and a copy of the specifications referred to in the agreement as "signed by the parties," without giving such signatures, and a copy of the plans and drawings, referred to in the agreement as "signed by the parties and hereunto annexed," without such signatures, all of which were attached together and marked "Memorandum of contract" and filed with the recorder, is sufficient to make the contract valid, where, without the aid of oral evidence, it shows all that is required to be shown by a memorandum of the contract, under section 1183 of the Code of Civil Procedure.

ID.—ABSENCE OF SIGNATURES.—The statute does not require the memorandum to be signed; and the absence of a copy of the signatures from the specifications and from the plans and drawings does not vitiate the memorandum.

ID.—MEMORANDUM NOT PURPORTING TO BE COPY OF CONTRACT.—Where there was nothing in the memorandum except the style of the writing to indicate that it was a copy of anything, its language, though reading like a contract, must be deemed that of a memorandum or statement of the substance of the contract.

ID.—REFERENCES IN MEMORANDUM TO PARTS OF ITSELF—FALSE DESCRIPTION HARMLESS—MAXIM.—The reference in the memorandum to the plans and drawings as "hereunto annexed" is to the memo-

random itself, and not to the original contract, and the references to the specifications, plans, and drawings as being "signed by the parties," must be deemed to describe them merely as parts of the memorandum, which asserts nothing as to the mode in which they were identified in writing as parts of the original contract, and, the defect being merely in the memorandum, the maxim, *Falsæ demonstratio non nocet*, applies.

ID.—DETAILED DRAWINGS MADE DURING CONSTRUCTION—HARMONY WITH PLANS AND DRAWINGS FILED.—Enlarged detailed drawings prepared during the construction of the building for the instruction of the workmen, which were in harmony with and did not change or add anything to the specifications, plans, and drawings filed with the recorder, and made parts of the memorandum, are not objectionable because not filed with the memorandum of contract.

ID.—UNNECESSARY REFERENCE IN CONTRACT.—A reference in the contract to such enlarged drawings as "detail drawings" is not to the signed plans and drawings made part of the contract, but it is an unnecessary reference, and does not affect the validity of the contract, if it indicates no change made therein.

ID.—AMBIGUOUS REFERENCE—ORAL EVIDENCE—VALIDITY OF CONTRACT.—The reference to "detail drawings" is sufficiently ambiguous to justify oral evidence of the architect to explain it, and to show that it referred to a mere amplification of the drawings which were a part of the contract, made during the progress of the work for the eye of the workman to indicate how that which was called for in the contract was to be done; although, without such explanation, the original contract was sufficient for the purposes of the law.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Waldo M. York, Judge.

The facts are stated in the opinions.

Graves, O'Melveny & Shankland, for Appellant.

Anderson & Anderson, and Borden & Carhart, for Respondents.

GRAY, C.—This is a mechanic's lien foreclosure case. The defendant Walker, the owner of the building, had judgment on the theory that his contract with the contractors, his codefendants, was valid under the statute, and that a memorandum thereof had been duly recorded, and that nothing remained due thereunder to the contractors. The plaintiff ap-

peals from the judgment and from an order denying it a new trial.

The defendant Walker, as the owner, entered into a builder's contract with the defendants V. Wankowski & Co., builders. Said contract was dated October 26, 1895, and was executed in three parts. Part 1 contained the agreements and covenants of the parties, and was duly signed by them. Part 2 consisted of specifications referred to in the first part as signed by the parties, and was in fact so signed. Part 3 consisted of the plans and drawings also referred to in the first part, and bore on its face an inscription as follows: "These plans from 1 to 6 are the plans referred to in our contract dated October 26, A. D. 1895." This inscription was duly signed by the parties. After the signing of the contract, as stated, a verbatim copy of the first part including the signatures, with a copy of the second part exclusive of the signatures, and a sunprint copy bearing a photographic representation of the third part except the signatures, were attached together, and this copy of the several parts of the contract was marked "Memorandum of a contract," and on the twenty-ninth day of October, 1895, filed with the county recorder. The originals were retained in the office of the architect. The foregoing facts appeared at the trial. The document marked "Memorandum of a contract" was introduced in evidence by the plaintiff, marked exhibit "A," and the defendant Walker put the said originals in evidence also. The property on which the building was to be erected was described in the first part of the contract as "on the corner of Hope and Adams street, in the city of Los Angeles, state of California, said building to be erected on the north side of Adams street." The drawings and plans, which were a part of the contract, represented the house as facing the longer way on Adams street, with a veranda the entire length of the Adams street front. One end of the house is shown to front on Hope street, and in the drawing of the Hope street front, standing in Hope street facing the house, the veranda appears to the left of the drawing, which establishes that the house, being on the north side of Adams street, must be on the northwest corner of Hope and Adams streets. The drawings also show just where the house is located with reference to the streets, property lines, etc. It was stipulated in open court, by

counsel for both parties, that if the court determines from the evidence that plaintiff's exhibit "A" is a valid contract of memorandum thereof, or a compliance with the statute with reference to either filing a contract or a memorandum thereof, that judgment shall be entered for defendant; and, on the contrary, if the court determines from such examination and from the evidence that said plaintiff's exhibit "A" is not a valid contract or memorandum of a contract, and is not in compliance with the law, that then judgment shall be entered for the plaintiff.

Section 1183 of the Code of Civil Procedure provides that "the said contract, or a memorandum thereof, setting forth the names of all the parties to the contract, a description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be due and payable, shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated."

We think the provisions above quoted were substantially complied with in the filing of the document above referred to entitled "Memorandum of a contract." Nor is there anything in any previous decision of this court in conflict with this position. In *San Francisco Lumber Co. v. O'Neil*, 120 Cal. 455, the question of whether a copy of the contract might be treated as a memorandum under section 1183 of the Code of Civil Procedure was not involved and was not decided. The document shown in the case at bar to have been filed in the recorders office was not treated either as an original or as a copy, but was filed as a memorandum and was so entitled. We can hardly conceive of a more complete memorandum of a contract than is to be found in a verbatim copy of it. The description contained in it was such that by the instrument itself, and without the aid of oral evidence, the building, and property on which it was situated and necessary for the convenient use of said building, could have been located on the ground. It also contained an ample statement of the general character of the work to be done as well as everything else required by the statute. The statute does not require the memorandum to be

signed. (*Joost v. Sullivan*, 111 Cal. 286.) Nor was it necessary that the signatures to the plans, specifications, and drawings should have been copied into the memorandum to make it sufficient. That the drawings and specifications had been signed by the parties appeared by a recital in the copy of the articles of agreement which constituted a part of the memorandum filed.

The objection that the enlarged detailed drawings, prepared during the course of constructing the building for the instruction of the workmen, were not attached to or made part of the original contract is without merit. Complete drawings in detail were made part of the original contract, and it is, doubtless, to these drawings that the references are made in the specifications.

We advise that the judgment and order be affirmed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J.

TEMPLE, J., concurring.—The document filed in the recorder's office was entitled "Memorandum of a contract." There was nothing except the style of the writing to indicate that it was a copy of anything. The first part reads like a contract, but its language must be deemed that of a memorandum or statement of the substance of a contract. It states that the contractors agreed to build in conformity to drawings "signed by the parties and hereunto annexed." "Hereunto" refers, of course, to the memorandum. It cannot possibly be construed to refer to the original contract of which this document is a memorandum. To hold that it does so refer would be to say that the document is not a memorandum of the contract, but a copy thereof. The drawings and specifications referred to are not signed by the parties. Is this false reference fatal? The case is not directly within *Donnelly v. Adams*, 115 Cal. 129, or the case of *West Coast etc. Co. v. Knapp*, 122 Cal. 79. These cases hold, substantially, that the contract is not wholly in writing, as required by the statute, unless the plans and specifications referred to are identified in writing as part of the contract. The memorandum here asserts nothing as to the

mode in which this was done in the making of the contract. If a defect, it is one in the memorandum only; and, so considered, I think it a case where the maxim, *Falsa demonstratio non nocet*, applies. The specifications are otherwise sufficiently identified; they are attached to the memorandum as a part thereof.

The reference in the leading opinion to the "detail drawings," as probably meaning the drawings which were filed, is plainly an oversight. The statement shows that it was admitted at the trial that none of these detail drawings were filed. They must, therefore, refer to something other than the drawings which were filed.

It was proven at the trial that these drawings were all made after the work was commenced, and did not add to or change the contracts, specifications, or drawings on file. They merely showed to the eye of the workman how that which was called for in the contract was to be done. Reference to them in the contract was not necessary, and putting them in worked no change.

The real objection urged to this is that the whole contract was not in writing, and parol testimony was not admissible to show that the reference to detail drawings added nothing to the contract as written. As illustrated in *West Coast v. Knapp, supra*, a reference might be so material as to demonstrate that a most important part of the contract was not in writing, within the meaning of the mechanic's lien law. When we get the explanation made by the architect, we see plainly that the word "detail" may be properly held to refer to just such an amplification and enlargement as was done. The architect, without the detail drawings, could have stood over the workmen and given directions to the same end. I think the phrase sufficiently ambiguous to allow the oral evidence, and that without the explanation so made the original contract was sufficient for the purposes of the law.

In other matters I agree with the leading opinion.

Henshaw, J., concurred.

[S. F. No. 1573. In Bank.—June 25, 1900.]

PAULINE WESTERFELD et al., Executors of Will of
William Westerfeld, Deceased, Respondents, v. NEW
YORK LIFE INSURANCE COMPANY, Appellant.

LIFE INSURANCE—SETTLEMENT OF DISPUTED POLICY—REPUDIATION FOR FRAUD—ACTION FOR RESIDUE—CONTRACT—TORT.—An action by the executors of the will of a deceased person to recover the residue of a policy of life insurance, a dispute concerning which had been settled for a little over one-fourth of the policy, in which the complaint avers that plaintiff, before bringing the action, notified defendant that they “repudiated said settlement upon the ground that it procured by fraud,” consisting of certain false representations, and demanded payment of the residue of the policy, must be regarded as founded upon the policy as a subsisting contract, and cannot be considered as an action in tort for damages for deceit for the fraud charged.

ID.—SETTLEMENT AND RELEASE NOT VOID—RESCISSION.—The action cannot be sustained upon the theory that the settlement and release can be treated as void for the alleged fraud. This is contrary to the rule of our statute, which provides in section 1566 of the Civil Code that a consent to a contract procured by fraud “is nevertheless not absolutely void, but may be rescinded by parties in the manner prescribed by the chapter on rescission.”

ID.—ELECTION OF REMEDY—RESCISSION—DAMAGES.—One who has been defrauded by a contract of settlement may elect either to rescind and restore what he received, and recover what he was induced to part with, or to affirm the contract and sue for damages for the fraud. But he cannot have both remedies; and, if there has been a rescission, an action for damages cannot be sustained.

ID.—SETTLEMENT OF DISPUTED CONTRACT—DAMAGES FOR FRAUD.—Where a disputed claim under a contract is settled by the parties thereto, the measure of damages for fraud in inducing the settlement is not necessarily the extinguished balance of the claim, but indemnity for the real loss sustained, in view of the uncertainties and expense of expecting litigation, unless for special reasons exemplary damages may be awarded. The indemnity merely may be much less than the contract balance.

ID.—RESTITUTION UPON RESCISSION—OFFER BEFORE SUIT.—Where money is received upon the settlement of a disputed claim, and it cannot be affirmed beforehand with certainty that, as the result of litigation, the plaintiff would surely be entitled to recover as much as or more than he received upon the settlement, the restitution of what

he received upon rescission of the contract for fraud, and the offer of such restitution before suit brought is a necessary condition precedent to maintaining an action upon the original demand.

ID.—RIGHT OF ACTION—BAR OF EXISTING COMPROMISE.—A right of action must exist in the plaintiff when the action is commenced, and, where there is then an unrescinded existing compromise, it is binding when the suit is commenced, and is a bar thereto, which is not removed by verdict or judgment.

ID.—VARIANCE—OBJECTIONS—EXCEPTIONS—MOTION FOR NONSUIT.—If it were permissible to allow a judgment for the plaintiff for the full amount of the policy to stand upon a theory of the complaint which is at variance with its allegations, for the reason that it may be substantially just, such judgment cannot be permitted to stand when the allegations made are not sustained, and objections were raised and exceptions taken to the rulings of the court throughout the case, and a motion for a nonsuit was made upon that ground, and erroneously denied.

ID.—REPRESENTATIONS NOT FRAUDULENT.—Representations that the policy in question was never delivered to the decedent, and that it was merely submitted to him for examination to be finally delivered if he approved of it, and paid the premium, which he did not do, are not fraudulent, where the testimony shows that there was no binding delivery of the policy, as an executed contract, and that the deceased did not accept it as delivered, and did not indicate that he was satisfied with it, and did not pay the premium.

ID.—UNAUTHORIZED AGREEMENT OF LOCAL AGENT—CASH SURRENDER VALUE OF OLD POLICY—CONCEALMENT BY COMPANY NOT FRAUDULENT.—An unauthorized agreement between a local agent and the deceased that the cash surrender value of an old policy, which the deceased had before expressly refused to keep up, and which, according to its terms, then had no surrender value, and could not be modified by any other officer than the president, vice-president, or actuary of the company, should be applied toward payment of premiums on the new policy, the amount thereof to be ascertained by the company, cannot bind the company to allow any surrender value, or estop it from insisting upon the terms of the new policy as to payment of first premium; and a concealment by the company of such unauthorized agreement at the time of the settlement of the policy with the executors of the deceased was not fraudulent.

ID.—NONPAYMENT OF FIRST PREMIUM—ABSENCE OF LIABILITY.—An insurance company is not liable upon a policy delivered by a local agent, where the first premium is not only not paid, but there is an entire absence of liability on account of the premium, and the policy holder cannot be compelled to pay it.

1D.—KNOWLEDGE OF AGENT, WHEN NOT AFFECTING PRINCIPAL.—The knowledge of an agent is not knowledge of the principal in respect of matters not within the scope of the agent's authority.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. George H. Bahrs, Judge.

The facts are stated in the opinion of the court in Bank, and in the opinion rendered in Department Two.

Page, McCutchen & Eells, for Appellant.

There could be no rescission of the settlement by way of compromise of the disputed policy, without restitution of the money received under it, and an offer thereof must be made before suit on the policy could be maintained. (Civ. Code, secs. 1521-23, 1541, 1566, 1567, 1689, 1691; *Herman v. Haffenegger*, 54 Cal. 161; *Hammond v. Wallace*, 85 Cal. 522, 532¹; *Kelley v. Owens*, 120 Cal. 502; *Dobinson v. McDonald*, 92 Cal. 33; *Jurgens v. New York Life Ins. Co.*, 114 Cal. 161; *Buena Vista etc. Co. v. Tuohy*, 107 Cal. 243; *Bank v. Wickersham*, 99 Cal. 655; *Gould v. Bank*, 86 N. Y. 75; *Brown v. Hartford Fire Ins. Co.*, 117 Mass. 479; *Moore v. Massachusetts Ben. Assn.*, 165 Mass. 517; *Bisbee v. Ham*, 47 Me. 543; *Potter v. Monmouth Ins. Co.*, 63 Me. 440; *Farnsworth v. Whitney*, 74 Me. 370; *Home Ins. Co. v. Howard*, 111 Ind. 544; *Pangborn v. Continental Ins. Co.*, 67 Mich. 683; *Morris v. Great Northern Ry. Co.*, 67 Minn. 74; *East Tennessee etc. Ry. Co. v. Hayes*, 83 Ga. 558; *Och v. Missouri etc. Ry. Co.*, 130 Mo. 37; *Harkey v. Mechanics' etc. Ins. Co.*, 62 Ark. 274.²) The measure of damages for fraud in procuring the settlement of a disputed claim is not the contract balance. (*Gould v. Cayuga Bank*, 99 N. Y. 333, 339.) Westerfeld was put upon notice of the terms of his old policy. (*New York Life Ins. Co. v. McMaster*, 87 Fed. Rep. 63, 67.) There was no fraud in the settlement. The unauthorized agreement to apply cash surrender value was not binding upon the company, and the acceptance of the new policy being conditional, it was not binding upon Westerfeld. (*Harnickell v. New York Life Ins. Co.*, 111 N. Y.

¹ 20 Am. St. Rep. 239.

² 54 Am. St. Rep. 295.

390.) One party cannot be bound if the other is not. West-
erfeld's executors could not give a void policy any binding
effect. (*P. & A. L. Ins. Co. v. Ewing*, 92 U. S. 377; *Gid-
dings v. North Western Mut. L. Ins. Co.*, 102 U. S. 108.)

Van Ness & Redman, for Respondents.

The policy took effect upon its delivery. (*Farnum v. Phoe-
nix Ins. Co.*, 83 Cal. 246³; *Griffith v. New York Life Ins. Co.*,
101 Cal. 627⁴; *Berliner v. Travelers' Ins. Co.*, 121 Cal. 451.)
The action is substantially to recover the detriment caused by
the fraud which induced the settlement. Plaintiff has stated
the facts which in law constitute his damage, and is entitled to
recover it. (*Bartlett v. Bank*, 79 Cal. 218⁵; *Riser v. Walton*,
78 Cal. 490; *Loeb v. Kamak*, 1 Mont. 152; *Weaver v. Missis-
sippi etc. Co.*, 28 Minn. 542; *Raymond v. Traffarn*, 12 Abb.
Pr. 52; *Connoss v. Meir*, 2 E. D. Smith, 314.) The plaintiff
was entitled to keep what he had, and claim damages for the
fraud. (*Gould v. Bank*, 86 N. Y. 75.) The measure of dam-
ages is the amount shown to be due. (*Walsh v. Sisson*, 49
Mich. 423; *Clews v. Traer*, 57 Iowa, 459; *Mallory v. Leach*,
35 Vt. 156⁶; *Sibley v. Hulbert*, 15 Gray, 509.) A prelimi-
nary tender was not required, when the facts show that it
would have been rejected. (*Girard v. St. Louis etc. Co.*, 123
Mo. 358⁷; *Sandford v. Royal Ins. Co.*, 11 Wash. 653.) A
party is not required to tender that which he is entitled to re-
tain. (*Watts v. White*, 13 Cal. 321; *Kley v. Healy*, 127 N. Y.
555; *Richards v. Fraser*, 122 Cal. 456, 461; *Gilson etc. Co. v.
Gilson*, 47 Cal. 597; *Allerton v. Allerton*, 50 N. Y. 670; *Har-
ris v. Equitable Life Assur. Co.*, 64 N. Y. 196; *Fisher v.
Bishop*, 108 N. Y. 25⁸; *Berry v. American etc. Ins. Co.*, 132
N. Y. 49⁹; *Reynolds v. Westchester Fire Ins. Co.*, 40 N. Y.
Supp. 336; *Sheanon v. Pacific Mut. etc. Ins. Co.*, 83 Wis. 507;
O'Brien v. Chicago etc. Ry. Co., 89 Iowa, 644; *Springfield etc.
Ins. Co. v. Hull*, 51 Ohio St. 270¹⁰; *Metropolitan R. R. Co. v.
Manhattan R. R. Co.*, 11 Daly, 373, 451; *Pierce v. Wood*, 23
N. H. 519, 531; *Judge of Probate v. Stone*, 44 N. H. 593,

³ 17 Am. St. Rep. 233.

⁴ 40 Am. St. Rep. 96.

⁵ 12 Am. St. Rep. 139.

⁶ 82 Am. Dec. 625.

⁷ 45 Am. St. Rep. 556.

⁸ 2 Am. St. Rep. 357.

⁹ 28 Am. St. Rep. 548.

¹⁰ 46 Am. St. Rep. 571.

608.) A suit in equity lies for rescission without previous offer of rescission. (*Gould v. Bank*, *supra*; *Watts v. White*, *supra*; *Day v. Mooney*, 3 Okla. 608; *Brown v. Norman*, 65 Miss. 369¹¹; *Neblett v. MacFarland*, 92 U. S. 101; *Martin v. Martin*, 35 Ala. 560; *Shuee v. Shuee*, 100 Ind. 477; *Thackrah v. Haas*, 119 U. S. 499; *Thomas v. Beale*, 154 Mass. 51; *Knappen v. Freeman*, 47 Minn. 491; *Maloy v. Berkin*, 11 Mont. 138.)

TEMPLE, J.—This case was decided in Department, the opinion being written by Mr. Commissioner Britt. A rehearing was granted solely because it was thought by some members of the court that the complaint stated a cause of action for damages for deceit—it having been held in the Department opinion that it did not. Upon mature consideration we think the decision rendered in Department is right, and the opinion is adopted as the opinion of the court in *Bank*, except as it may be deemed to have been qualified by this opinion.

Counsel for respondent contend that the court in Department took too narrow a view in its construction of the allegation that the plaintiffs “repudiated said settlement upon the ground that it was procured by fraud on the part of defendant.” They say the allegation is but the statement of one of the facts constituting their cause of action. If this be so, evidently they have no action for damages. An action for damages will not lie because of such repudiation. The action for deceit is based upon the proposition that they were induced by fraud to release and surrender their original demand. If they repudiate such release they cannot claim that they were damaged by being induced by fraud to release, for they have not released. We do not agree that by bringing a suit for damages by a proper complaint plaintiffs would thereby repudiate the settlement which they were by deceit induced to make. They would affirm the settlement and aver in effect that it was not as good a settlement as they were entitled to, and that they were deceived into making it by the fraud of defendant, and their damage would be what they lost through such deceit. If the settlement does not stand they have not been damaged. It was through making the unfortunate settlement that they suffered damage.

One who has been so defrauded has his choice of two remedies: He may rescind, and recover that which he was induced to part with. If he does this, evidently the wrong done him has been righted, or usually would be. It may chance, however, that when he discovers the fraud he cannot rescind, or that rescission would not fully compensate his loss. He may therefore decline to restore what he received in the settlement or other contract he was induced by fraud to enter into, and, affirming the contract, sue for damages. But he cannot retain what he received and recover what he parted with. If he wishes to recover that, he must promptly offer to restore what he received and demand a rescission. This is the requirement of the code.

Counsel further contend that if this allegation is thought inconsistent with the view that the action is for damages, then it might be regarded as surplusage. They say they attempted to state in the complaint "all the facts, and expected to recover upon those facts upon any theory permissible. But we insist that even although the intention had been to sue upon the policy, treating the release as void because of the fraud, we can still recover in an action for damages, if, upon the facts stated, the law permits a recovery of damages."

The allegation under criticism is a very imperfect averment of a statutory rescission, yet it clearly implies that such rescission has been made. Conceding that the other facts stated would justify and sustain a judgment for damages, yet if there has been a rescission the action for damages cannot be sustained.

But if the plaintiffs are entirely wrong in their legal theory, and have brought and tried their case, not as an action for damages, but upon the policy, claiming that the compromise is void, giving credit for the amount received in the compromise as so much paid on account, as plaintiffs have, when they should have affirmed the contract and sued for damages, has the defendant been injured by the mistaken form of the action? It is contended that the case of the plaintiffs, so far as concerns the important matters of the controversy, is the same as it would have been. It is so, except that some further matters in regard to a rescission would have been brought in. The defense, except as to what might have been said about rescission, is the same. The rule as to the recovery is the same

if we accept the rule of damages contended for by the respondents. Their contention is that in cases of this character, where a creditor has been induced by fraud to accept less than was due, even when the whole demand is disputed, the damage is the difference between what he was induced to accept as full payment and what was really due.

I think, however, the rule is correctly stated in the Department opinion. It applies to other contracts than those of this character as well. In some possible cases to recover what one has been induced to part with by fraud would not be full compensation, and at all events such a plaintiff is only entitled to be indemnified, unless for special reasons exemplary damages may be awarded. But if it were permissible to allow a judgment to stand, because we can see that substantial justice has been done, when it appears that the plaintiff did not establish the case stated in his complaint, but some other which he might have stated, it cannot be done here, for objection was made and exception taken at every step in the progress of the case and a motion for a nonsuit was made upon this very ground, and the ruling denying it is assigned as error.

But I think the judgment and order must be reversed for another reason. The facts proven do not show fraud, and plaintiffs could not recover in any form of action. The alleged fraud consisted in an affirmative representation that the policy had never been delivered to Westerfeld, but was merely submitted to him for examination, to be finally delivered if he approved of it and paid the first premium, and that he never signified his approval and did not pay the first annual premium; and also in concealing the fact that it was agreed between Westerfeld and the corporation that Westerfeld should be allowed a surrender value upon his first policy, which should be applied and received in payment of the first premium upon the second policy. And, further, that Westerfeld was given time in which to pay such first annual premium until such surrender value had been fixed by the defendant, and that no surrender value had been fixed up to the time of Westerfeld's death.

If the facts which it was alleged defendant concealed had any existence, then the affirmative representations charged upon defendant were false. Plaintiffs proved the falsity of the representations by the uncorroborated evidence of Todhunter,

a former employee of defendant. He testified, in effect, that Westerfeld was dissatisfied with his first policy and threatened to make trouble for the company, which he charged had cheated him. Thereupon Westerfeld was induced by Hawes, general manager of the defendant, acting through Todhunter, to take out a new policy, upon the consideration that he would be allowed a surrender value upon the first policy which would about pay the first premium. It is, in effect, so stated in the complaint, although, in accordance with the admitted design to have such pleadings as could support any legal theory, it is not expressly stated that the acceptance of the new policy was so conditioned. The evidence of Todhunter plainly shows that only upon this promise did Westerfeld consent to accept the new policy. All the negotiations were through Todhunter, and he testified that he reported to Colonel Hawes that Westerfeld would be satisfied with the new policy "if he could determine the cash surrender value of the first," and that Hawes promised to refer that matter to the home office. Further, that Westerfeld wanted to know what the cash surrender value would be, and was told by Todhunter that it would be about eight hundred dollars. At the time he received the application he says: "It was understood that, if the cash surrender value of the first contract fell short of the premium required to pay the second, he would have to pay the difference, and if there was any overplus the company would give him the difference. I told him that. I do not recall exactly what he said, except that he gave me the application." And when the policy was delivered he told Westerfeld that there was nothing further to do with reference to the delivery except applying the surrender value of the first. And afterward when Todhunter received a note from the manager calling his attention to the outstanding policy and saying it must receive immediate attention, he, as he testified, called upon Hawes and reminded him of the arrangement, and that "Westerfeld was not called upon to pay the premium until the surrender value of the first contract was obtained from New York." The only other testimony in regard to delivery was given by Mr. More, who testified that at the request of Todhunter he handed the policy to Westerfeld, who remarked: "I am not to settle for this until I submit this to my friend." According to this testi-

mony Westerfeld did not accept the policy as delivered, and there is no evidence which tends to prove that after this Westerfeld ever indicated that he was satisfied with it. This certainly does not show a delivery which would bind anyone. It counts for nothing if in fact, as respondent contends, the policy was such as Westerfeld contracted for. He refused to accept it until he was satisfied upon this subject.

Upon this point, therefore, there was no evidence to sustain the verdict except that of Todhunter, from which it clearly appears that Westerfeld took the new policy, if he did accept it, upon the representation that a surrender value would be paid upon the first policy, and, of course, had the company refused to allow such value, he could not by the corporation be held for the annual premium.

The policy as issued to Westerfeld in 1890, called the first policy, contained these provisions:

"No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, to issue a permit for residence, travel, or occupation, or to bind the company by making any promise or receiving any representation or information. This power can be exercised only by the president, vice-president, or actuary of the company, and will not be delegated. . . .

"Surplus will be apportioned to this policy only at the expiration of each period of five years from the date of the commencement of the insurance, and then if this policy is in force. . . .

"This policy may be surrendered to the company at the expiration of the first or of any subsequent five-year period, upon thirty days' previous written notice. At the expiration of the first period eighty per cent of its reserve (computed as hereinbefore specified), and in addition thereto the surplus then apportioned, will be allowed as a surrender value. At the end of any subsequent period the entire reserve (computed as hereinbefore specified), and in addition thereto the surplus then apportioned, will be allowed. The above cash values will not be allowed for a surrender at any other time."

Before taking the second policy, as alleged, Westerfeld had most persistently refused to pay "another single cent"

upon the first policy. He was not, therefore, prevented from paying by the negotiations in regard to the second. He was presumed to know the conditions of the policy, and, in fact, had given it a careful examination, as is shown by his complaints. He knew, therefore, that the first policy had no surrender value whatever, and that its terms could not be modified by any officer of the corporation except the president, the vice-president, or actuary. Hawes was not one of the officers mentioned. Indeed, it is not shown even by Todhunter's testimony that such modification was agreed to by Hawes, but only that he promised to apply to the home office to have them do it, if possible, and nothing further was done in the matter either by the home office or by Hawes. But granting that Hawes promised that such modification would be made, and that the policy was delivered upon such promise, is the defendant bound by it? Respondents argue that it was not a modification of the first policy, but only an agreement as to the mode of paying a premium on the second. But that is not the case. The second policy was accepted in consideration of a promise to modify the terms of the first policy and allow a surrender value therefor—contrary to the stipulations contained in it.

But it is contended that the company is estopped to deny the authority of Hawes; that, having delivered the policy without express condition, it is bound thereby. Upon the uncontradicted testimony the court should have found that the policy was not delivered as an executed contract. But there was no estoppel upon any view. Westerfeld had notice of the want of authority, and also that Hawes made no claim to such authority. It is not a case where the corporation has been paid to carry a risk and is now attempting to escape liability. Westerfeld did not pay the first premium, and could not have been compelled to do so. Cases holding that when an agent gives credit in violation of his authority, and delivers the policy, the company is bound, do not go far enough for plaintiffs. They do not hold that the company shall be bound, though the premium is not to be paid and there is no liability on account of it. (*Harnickell v. New York Life Ins. Co.*, 111 N. Y. 390; *Insurance Co. v. Ewing*, 92 U. S. 377; *Giddings v. Insurance Co.*, 102 U. S. 108.) *Farnum v. Phoenix Ins. Co.*, 83 Cal.

246,¹² is much relied upon by respondents. It was there held that the promise to pay on the part of the insured was a sufficient consideration for the contract, and that a local agent having authority to solicit business and make contracts of insurance, to countersign and deliver policies, binds his principal within the general scope of his apparent authority, notwithstanding an actual excess of authority. Any fact known to such agent which could constitute a breach of a condition and make the contract void, at the option of the company, from its inception, will be considered waived. The company cannot, in general, receive through its agents pay for carrying a risk, and be able when loss occurs to avoid liability by taking advantage of a limitation upon the authority of the agent. Here this state of things did not exist. It had not been paid to carry the risk, and could not have enforced payment. In the Farnum case the difference in the construction of limitations upon the power of agents in entering into contracts of insurance, and in modifying them afterward, is recognized.

It is also said that whether a particular agent has power to waive conditions is a question of fact. Plaintiffs offered no evidence as to the authority of Hawes except the policy, which expressly denied to him the authority to modify the contract. The burden was upon plaintiffs. The title "general manager," for a specified territory, does not establish the particular authority required, especially after this express limitation, which was known to the insured.

Respondent also relies upon a class of cases like *Kahn v. Traders' etc. Co.*, 4 Wyo. 419.¹³ In that case it was held that consent to additional insurance given by an authorized agent, upon which the insured acts, will bind the company, although not indorsed upon the policy as required, although the authority of the agent was expressly limited to that mode. The reasons given are that the company had notice of the additional insurance—notice to the agent being notice to the company—and should have promptly notified the insured, if it did not consent, and also that it could not so tie its hands or that of its agents. The transaction was one which the agent was fully authorized to make, and the insured had

¹² 17 Am. St. Rep. 233.

¹³ 62 Am. St. Rep. 47.

done everything which ordinarily he would be required to do. But the company required, in addition, that for its protection he should see that the agent executed his undoubted authority in a certain mode. There are numerous authorities upon the subject and the matter is extensively discussed in the text-books. The majority of cases seem to be against the position taken in that case, but it is said that the present trend is in favor of the rule there declared. It is also said in that case, and numerous other cases with like conflict, that an adjuster can bind the company for whom he acts by his declaration that proofs furnished are sufficient, notwithstanding provision in the policy to the contrary. If this means that the company is bound unless it promptly gives notice that it is not satisfied, and in time to enable the insured to make his proof, it is clearly right and in accord with rules applicable alike to other transactions. But I see nothing in these decisions applicable to this case. Knowledge of the agent is not knowledge of the principal in matters not within the scope of the agent's authority. I see nothing unfair in such a limitation upon the authority of an agent as to matters involved here. To make such modification of the contract is not usually expected of an agent, and the power to do so is not implied in what may be called his usual ostensible authority.

It may be remarked that, as the correctness of the order refusing a nonsuit is involved on this appeal, we are not hampered by anything the court found or failed to find. Plaintiff's case was not strengthened by evidence after the ruling on the motion for a nonsuit was made.

The judgment and order are reversed.

McFarland, J., Harrison, J., Van Dyke, J., and Henshaw, J., concurred.

The following is the opinion rendered in Department Two, August 1, 1899:

BRITT, C.—Plaintiffs sue as executors of the last will of one William Westerfeld, late of the city of San Francisco. Defendant is an insurance corporation of the state of New York. Plaintiffs allege in their complaint, among other things, that on April 19, 1890, the defendant issued to their testator a policy of insurance upon his life in the sum of

ten thousand dollars, which policy included a provision that at the expiration of five years from its date the insured might surrender the policy and receive its "then cash value"; that after Westerfeld had paid four annual premiums thereon an arrangement was effected between him and the defendant whereby the latter executed to him a new policy of date February 19, 1894, for the same amount as the former but on a different plan, and promised that it would compute the surrender value, in cash, of said first issued policy and apply the surplus thereof above the fifth premium, to become due the following April, in payment of premiums on said second policy, Westerfeld agreeing on his part to give up the first policy as soon as the company should have determined its value as aforesaid and given him credit therefor on its books; that Westerfeld died February 18, 1895, having yet in his possession both said policies, and having received from defendant no notice of the cash surrender value of the first policy, which, however, was a sum more than sufficient, after deducting the fifth premium on the first policy, to pay the first premium on the second.

Plaintiffs further allege that as executors aforesaid they afterward demanded of defendant the payment of the amount of the said second policy; that defendant refused to pay any part thereof, and by false and fraudulent representations—to the general effect that the policy of February, 1894, never was in force, but had been delivered to Westerfeld for examination only, that he never accepted it nor paid any premiums thereon, and had been notified to return it to defendant; also that the first policy had become void by failure of Westerfeld to pay the fifth annual premium—the defendant inveigled plaintiffs into a compromise whereby they surrendered both said policies and gave a release of all demands thereunder in consideration of the sum of two thousand six hundred and sixty-six dollars and sixty-six cents then paid to them by defendant. That but for the said representations, the falsity of which was then unknown to plaintiffs, they would not have accepted less than the face of the last policy, and that prior to the commencement of this action plaintiffs notified defendant that they "repudiated said settlement upon the ground that it was procured by fraud," and demanded payment of the difference between the sum

paid as just mentioned "and the amount due them under the terms of said policy issued February 19, 1894." The prayer of the complaint was for judgment in the sum of seven thousand three hundred and thirty-three dollars and thirty-three cents, and interest from March 27, 1895, the date of proofs of death.

For defense to the action defendant admitted making the representations alleged by plaintiffs, but denied their falsity and averred that they were true; it contested its liability on the policy of 1894, and claimed that if its local agents (with whom alone Westerfeld dealt) made any arrangement looking to the application of a surrender value of the first policy in payment of premiums on the second, they violated the provisions of the first policy, which allowed a surrender value to the same only after it had been in force for five years, and exceeded their powers, and that their acts were never ratified. Defendant also contended that plaintiffs could not maintain the action without rescinding the contract of compromise and restoring or offering to restore the money they then received as the fruit thereof. The trial was by jury and resulted in a verdict and judgment for plaintiffs for the sum demanded in their complaint.

The decision of but one of the several questions debated by counsel will suffice for the disposition of the case. Notwithstanding the elaborate and very able argument with which plaintiffs' counsel have supported their contention that no restoration or offer of restoration of the money received by their clients upon the compromise was necessary to the success of this action, we are unable to accept that view.

It is said in the first place that the action is to be treated, not as founded on the policy, but as in tort for deceit and to recover damages for the fraud practiced by defendant. The complaint, however, was not drawn upon that theory. It is, of course, true that a party who has been led by fraud into a settlement whereby he accepted less than is justly due him in extinguishment of legal claims may, on discovering the fraud, sue for the damage he has sustained without taking any steps to rescind the settlement; the law allows such an action, although, as has been said here, "Even in that case great wrong is sometimes done when rescission is not required" (*Bancroft v. Bancroft*, 110 Cal. 379); but it pro-

ceeds on the assumption that the plaintiff affirms the contract of compromise—abandons the cause of action which it superseded—and claims damage for the fraud which induced the new contract. In the present instance the plaintiffs distinctly aver in their complaint that they “repudiated said settlement upon the ground that it was procured by fraud upon the part of defendant,” and demanded payment of the difference between the sum they had received and the “amount due them under the terms of said policy issued February 19, 1894.” The frame of the complaint shows that the action is bottomed on the policy itself as a subsisting contract, and that in consequence of the fraud charged the release is treated as simply void. This is contrary to the rule of our statute; a consent to a contract procured by fraud “is nevertheless not absolutely void, but may be rescinded by the parties in the manner prescribed by the chapter on rescission.” (Civ Code, sec. 1566.) The like view of the plaintiffs’ cause of action was submitted to the jury at the trial. The court instructed them in substance that if they believed the averments of the complaint to be true their verdict should be for plaintiffs—not for such amount of damage as they might find to have been caused by the alleged fraud—but “in the sum of seven thousand three hundred and thirty-three dollars and thirty-three cents, with interest thereon from March 27, 1895, at seven per cent per annum,” which was the exact amount of the policy, less the compromise payment, with interest on the difference. Plaintiffs maintain that this statement of the measure of damages was appropriate to an action sounding in tort for the fraud, but it seems to us to proceed on an unwarranted assumption, viz., that the jury must necessarily find that plaintiffs sustained the same damage by release of the policy on which defendant denied any liability, and which might have been the subject of possibly doubtful litigation, that they would have sustained if the policy had been wholly undisputed. There was evidence in the case from which the jury might have concluded that, without regard to the false representations, plaintiffs could better afford to accept less than the face of the policy than to sue on it; but the instruction took this question from their consideration, and so was not a correct statement of the law if the case is to be regarded as in tort. This subject has been considered by the court of

appeals of New York in an action for obtaining by fraud a compromise of a disputed contractual liability. The court said that the measure of damages "is not the extinguished balance, and cannot be without making the rule as to rescission an idle and useless formality, [but] its measure is indemnity for the real loss sustained, which may very well prove to be less, and even much less, than the contract balance. . . . What the plaintiff sold and what the defendant bought [the court thus describing the effect of the compromise agreement] was not a conceded but a disputed claim; worth, therefore, ordinarily, something less than its face for purposes of sale, transfer, or cancellation; how much less depending upon the continuing solvency of the debtor, and the probability of its successful enforcement, and that upon the underlying facts of the case; and depending also upon the probable extent and expense of the expected litigation." (*Gould v. Cayuga etc. Bank*, 99 N. Y. 333.) Plaintiffs inveigh strongly against the doctrine of that case, but in our opinion it is correct.

It is also contended that the case is within the rule that one who seeks to rescind a compromise on the ground of fraud is not required to restore the money or other benefits he has received from his adversary, if, whatever might be the result of his action, he would be entitled to keep what he has obtained. Cases of that nature arise when a party has been led by fraudulent contrivance to accept less money than was due him on an undisputed claim, as in *Gilson etc. Co. v. Gilson*, 47 Cal. 597, and in some other instances not necessary to be illustrated now. But in the present case, assuming, as plaintiffs did, that the bar to the action arising from the compromise, settlement and release, was avoided by allegations of fraud in the procurement of the same, then, of course, both parties were relegated to their original situation where plaintiffs asserted and defendant contested the liability of the latter on the policy (*Kley v. Healy*, 149 N. Y. 346); suppose plaintiffs should fail to establish such liability, it would then appear that they had two thousand six hundred and sixty-six dollars and sixty-six cents of defendant's money to which—the compromise under which it was paid being void, and the consideration moving to defendant for such payment, viz., immunity from suit on the policy, having failed—they could show

no right, and it seems quite elementary to say that in such event they could not lawfully keep what they had obtained. It is no answer to say that plaintiffs did prove to the satisfaction of the jury that the policy they surrendered was an enforceable obligation in their favor; or, what is much the same thing, that the judgment, by which the plaintiffs recover only the difference between the face value of the policy and the sum paid by defendant on the compromise, is a sufficient restoration of such payment. These things were problematical until judgment rendered; and to adopt such a test for determining whether restoration was necessary before suit is to say that the plaintiffs could gain their right of action—to wit, of recovery on the policy, which was barred by the compromise—as the result of the action; whereas the settled rule is that the right must exist when a plaintiff commences his action. As remarked by Mr. Bigelow (1 Bigelow on Fraud, 82): “The compromise is a binding contract until rescinded; it is binding them when he brings his suit.” And so are *Civ. Code*, sec. 1566; *Morrison v. Lods*, 39 Cal. 381; *Bohall v. Diller*, 41 Cal. 532; *Herman v. Haffenegger*, 54 Cal. 161; *Wainwright v. Weske*, 82 Cal. 193.

Another contention is that the action may be regarded as one for a rescission of the compromise by judgment of the court, and that in cases of that character no attempt at rescission by the plaintiff himself before suit brought is necessary. Rescission by the court in this case necessarily involved the setting aside of the compromise and cancellation of the release—powers exercisable only by the court in equity and not by a jury (*Mesenburg v. Dunn*, 125 Cal. 222); such jurisdiction of the court below was neither invoked nor exerted, and the judgment is wholly silent touching a rescission; it is therefore erroneous in any aspect. But, aside from considerations arising from the practice at the trial, the complaint is insufficient treated as a bill in equity for rescission; it is the law of this state (except under circumstances which, it is believed, we have sufficiently shown do not attend the present case) that the offer to restore what has been received under the contract impeached is a condition precedent to maintaining an action for a judicial rescission, as well as an action founded on the assumption that rescission has been accomplished by simple act of the party. (*Kelley v. Owens*, 120

Cal. 502, citing most of the previous cases on the subject.) Plaintiffs lay stress on *Watts v. White*, 13 Cal. 321. That was a suit between partners—plaintiff seeking to set aside a deed of his interst in partnership property procured by fraud of defendant, and to enforce an accounting. The court said that plaintiff risked his case on the result of the accounting, and since he alleged that a greater sum was due him than he had received for the deed no offer to restore the consideration for the deed was necessary before suit. We may observe that in such a case the money received by the plaintiff becomes part of the subject of the accounting; in any possible event he has an interest in it, and until the adjustment of the accounts is, it would seem, as much entitled to its possession as the defendant. Other distinctions might be drawn; as pointed out in a recent text-book, “tender in a case of rescission between parties to the sale of a partner’s interest in business stands upon a footing of its own.” (1 Bigelow on Fraud, 426.) *Watts v. White*, *supra*, does not aid the plaintiff’s case here.

Some other points made by plaintiffs in this connection do not require special notice. We must hold that the compromise was a good contract until rescinded, and not having been rescinded when plaintiffs sued it was a bar to the action not removed by the subsequent verdict of the jury or judgment of the court. (Civ. Code, secs. 1566, 1567, 1689, 1691; *Dobinson v. McDonald*, 92 Cal. 33; *Jurgens v. Insurance Co.*, 114 Cal. 161; *Hill v. Den*, 121 Cal. 42; *Kelley v. Owens*, 120 Cal. 502, and cases cited. See, also, the following, most of which are quite in point: *Gould v. Cayuga Bank*, 86 N. Y. 75; *Graham v. Meyer*, 99 N. Y. 611; *Yeomans v. Bell*, 151 N. Y. 230; *Potter v. Monmouth Ins. Co.*, 63 Me. 440; *Brown v. Hartford Fire Ins. Co.*, 117 Mass. 479; *Moore v. Massachusetts Ben. Assn.*, 135 Mass. 517; *Ewing v. Brake Shoe Co.*, 169 Mass. 72; *Home Ins. Co. v. Howard*, 111 Ind. 544; *Harkey v. Mechanics’ etc. Ins. Co.*, 62 Ark. 274¹⁴; *Och v. Missouri etc. Ry. Co.*, 130 Mo. 27; Bigelow on Fraud, 82.) The authorities cited by plaintiffs, so far as pertinent to this question, are in the main distinguishable from the case at bar either for the reason that they treated the release as wholly void, which it

cannot be under the statute of this state, or that the plaintiff suing in disregard of the release had been fraudulently led to compromise an undisputed demand, and so was in any case entitled to keep what he had received. Admitting that there is some conflict of authority, we are yet satisfied that the conclusion we have reached accords with the strong preponderance of adjudication both in this state and elsewhere. The judgment and order denying a new trial should be reversed.

Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed.

Temple, J., McFarland, J., Henshaw, J.

Rehearing denied.

[S. F. No. 1644. In Bank.—June 30, 1900.]

In the Matter of the Estate of JAMES G. PORTER, Deceased. T. G. YOUNG, Administrator, Appellant, v. STATE OF CALIFORNIA, Respondent.

ESTATES OF DECEASED PERSONS—SALE OF REAL ESTATE—BEST INTEREST OF ESTATE—CONSTITUTIONAL LAW.—Section 1536 of the Code of Civil Procedure, providing that “when it appears to the satisfaction of the court that it is for the advantage, benefit, and best interest of the estate and those interested therein that her real estate or some part thereof, be sold, the executor or administrator may sell any real as well as personal property of the estate upon the order of the court” is constitutional and valid.

ID.—RIGHTS OF HEIRS—EFFECT OF PREVIOUS STATUTE.—The rights of the heirs of an intestate are controlled by a statute in force at the time of the death of the intestate, regulating the administration of the estate or the sale of its property.

APPEAL from a judgment of the Superior Court of Sonoma County. S. K. Dougherty, Judge.

The facts are stated in the opinion.

W. F. Cowan, D. E. McKinlay, and C. H. Pond, for Appellant.

W. F. Fitzgerald, Attorney General, and Tirey L. Ford, Successor, for Respondent.

HAYNES, C.—James Porter died intestate in the county of Sonoma in November, 1897, leaving an estate consisting of real and personal property, the latter being more than sufficient to pay all debts and liabilities of the estate and the costs and expenses of administration. He left, however, no known heirs, relatives, or other person who would be entitled to inherit his estate, and the court so found.

The court also found as follows: "That said real estate is expensive to properly maintain and manage; that a portion of the same is planted to vines which need the constant care and attention of some person qualified to attend to the same; that the remainder of said real estate required to be cultivated and the fruit trees growing thereon attended to; that the fences and buildings on said premises will become dilapidated unless properly attended to; that said real estate, by reason of its not being occupied by some person interested therein, will deteriorate and depreciate in value; that said real estate can be sold at the present time for a better price than if sold later; that it will be difficult to lease said premises for a fair compensation by reason of there being no dwelling-house thereon; that the expense of maintaining and caring for said premises by said administrator, if he is compelled to employ labor and help, therefor, will largely exceed the revenues derived therefrom, and coupled with the taxes to be annually collected on said premises will be a source of expense which will be a disadvantage to the parties entitled to said estate."

As a conclusion of law the court found that it had no jurisdiction to make the order prayed for, and denied the petition, and from that order this appeal is taken.

The court placed its refusal to grant the order upon the ground that the following provision found in section 1536 of the Code of Civil Procedure is unconstitutional: "Or when it appears to the satisfaction of the court that it is for the advantage, benefit, and best interests of the estate, and those interested therein, that the real estate, or some part thereof, be sold, the executor or administrator may sell any real as well as personal property of the estate upon the order of the court."

The portion of said section above quoted was inserted therein by an amendment approved March 23, 1893. Prior to said amendment property of the estate was authorized to be sold for the payment of the family allowance, or debts due from the decedent, expenses of administration, or payment of legacies.

It is said the court below relied principally upon the case of *Brenham v. Story*, 39 Cal. 179, to justify its conclusion that it had no jurisdiction to make the order prayed for. That case arose under a special act of the legislature passed in 1861 (Stats. 1861, p. 152), after the death of Charles White, authorizing his administrator to sell any portion of the real estate held, claimed, or owned by White at the time of his death, as in the judgment of the administrator would best promote the interests of those entitled to said estate; and said act was held invalid upon the ground that the title to the property had vested in the heirs before the passage of the act, subject only to the power of the court to order a sale for the purposes specified by the statute in force at the time of White's death. The distinction, however, between that case and this lies mainly in the fact that here the amendment of 1893 was in force before the death of Porter, and therefore the estate vested in the heir, if any he had, subject to the exercise of the power given to the court by the amended statute. This amended statute has heretofore been called to the attention of this court in but one case, so far as I am aware, namely, in *Estate of Packer*, 125 Cal. 396.¹ In that case *Brenham v. Story*, *supra*, was followed because Packer died, while a resident of this state, before the said amendment of 1893 was enacted; and for that reason this court declined to consider whether said amendment was constitutional when applied to the property of persons dying after its passage, as that question did not arise. Here, the question is properly before us and must be decided.

It is a fundamental proposition that governments are formed, among other things, for the protection, not only of the rights of property, but of property itself; and its power to provide for the custody, care, and the descent and distribution of the property of intestates, real and personal, as well as the disposition of it by will, is unquestioned. (*In re Wilmerding*, 117 Cal. 281, 284.) It is true that under our statute upon the

¹ 73 Am. St. Rep. 58.

death of the ancestor the property of the intestate at once vests in the heir; but it vests subject to conditions imposed by the statute, such as the qualified possession and control of the administrator, under the direction of the court, for its care, and its appropriation to the payment of the debts of the decedent, expenses of administration, and other liabilities enumerated in the statute; but the right of the heir to inherit the estate being itself the creature of the statute, there can be no question as to its power to impose these liabilities upon the estate, subject to which the property vests in the heir. That the administrator, under the control and direction of the court, is charged with the duty of preserving the property until final distribution cannot be doubted. He must, if there are funds, preserve the title to the real estate by the payment of taxes, and its value by making necessary repairs, and is entitled to receive the rents and profits until the estate is settled, and must "preserve it from damage, waste, and injury." So the administrator, under the order of the court, at any time after receiving letters may sell "perishable and other personal property likely to depreciate in value, or which will incur loss or expense by being kept" (Code Civ. Proc., sec. 1522), whether there are debts or other liabilities to be paid or not; and this direction of the statute has no other basis than that of the preservation of the best interests of those in whom the statute vests the right of property, when it is not required to meet some charge imposed by law, and cannot be immediately delivered to the heir. So perishable property may be attached under a disputed contract liability, and be sold by order of the court before the defendant's liability is established.

These instances in which the state, by its statutes, disposes of private property are familiar and unchallenged, and are based upon the duty and power of the government to prevent injury by converting one kind of property into another for the benefit of the owner.

The statute before us involves no different principle, nor the exercise of any different power. We see no difference in principle between the sale of "personal property likely to depreciate in value, or which will incur loss or expense by being kept," and the sale of real estate under the facts found by the court in this case, nor any difference in the exercise

of legislative power in the two cases. The statute under consideration divests no one of his property, but authorizes one's real estate to be transmuted into personal property under such circumstances that the consent of the owner, if capable of giving it, would be presumed. The administration is in a condition to be closed if there were known heirs to whom it could be distributed. If none should appear, it will escheat to the state under the provisions of the Civil Code, sections 1404 to 1406. But in *People v. Roach*, 76 Cal. 294, it was held that a proceeding on behalf of the state, for the purpose of obtaining a decree that the estate has escheated to the state, is premature if commenced within five years after the death of the intestate. This estate must, therefore, remain in the hands of the administrator until such proceeding can be taken, unless within that time an heir capable of inheriting it should appear.

The order denying the petition should be reversed, with directions to the court below to amend its conclusions of law to conform to this opinion, and grant an order of sale as prayed for.

Chipman, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the order denying the petition is reversed, with directions to the court below to amend its conclusions of law to conform to this opinion, and grant an order of sale as prayed for.

Henshaw, J., McFarland, J.,
 Temple, J., Van Dyke, J.,
 Harrison, J.

[Sac. No. 738. In Bank.—June 30, 1900.]

HOUSER & HAINES MANUFACTURING COMPANY,
 Appellant, v. R. L. HARGROVE, Respondent.

APPEAL—JUDGMENT—LAPSE OF TIME.—An appeal from a judgment taken nearly two years after the rendition and entry of the judgment cannot be entertained.

1D.—NEW TRIAL ORDER—PROCEEDING INDEPENDENT OF JUDGMENT.—A motion for a new trial under the code is a proceeding independent of the judgment, and may be granted even after the judgment has

been affirmed upon appeal; and an order granting or denying a new trial may be reviewed upon an appeal taken in time, notwithstanding the judgment may be final.

SALE—HARVESTER—CHANGE OF TITLE—LATER CONDITIONAL SALE—TITLE OF SUBSEQUENT VENDEE.—Where a harvester was sold and delivered to the purchaser, under an agreement to give notes for the purchase money, and under the terms of an absolute sale passing title to the purchaser, the sale cannot be afterward converted into a conditional sale, without any change of possession, by a mere written agreement between the parties, so as to affect the title of a subsequent vendee of the purchaser to whom the possession was delivered.

ID.—CONDITIONAL SALES NOT FAVORED.—Conditional sales intended as security, in lieu of a chattel mortgage upon the property, are not favored; and, by reason of the opportunities for fraud presented by such contracts, courts are inclined to scrutinize them closely.

ID.—TAX TITLE—VALIDITY OF ASSESSMENT.—Taxes were properly assessed to the original purchaser of such harvester, while in his possession and control, with *indicia* of ownership invested under the original purchase thereof; and the addition of other names on the assessment-roll did not invalidate the assessment to him. The taxes being delinquent, the assessor's sale of the harvester to the highest bidder passed title to such bidder irrespective of the amount of the delinquent tax.

APPEAL from a judgment of the Superior Court of Madera County and from an order denying a new trial. W. M. Conley, Judge.

The facts are stated in the opinion of the court.

Louttit & Middlecoff, for Appellant.

R. L. Hargrove, Respondent *in pro per*.

VAN DYKE, J.—The appeal in this case is taken from the judgment, as well as from the order denying plaintiff's motion for a new trial. This judgment was entered on the twelfth day of August, 1897, and the notice of appeal served August 2, 1899, nearly two years after the rendition of the judgment. This court, therefore, cannot entertain the appeal from the judgment. The order denying the plaintiff's motion for a new trial was entered June 6, 1899, and the notice of appeal therefrom, as already shown, was in time. The motion for a new trial, under our code and practice, is a proceeding independent of the judgment. The motion may be granted even after a judgment has been affirmed on

appeal. (*Brison v. Brison*, 90 Cal. 327; *Riverside Water Co. v. Gage*, 108 Cal. 243.) The action is to recover possession of one Haines-Houser improved combined harvester, of the alleged value of one thousand dollars. The court below found that the plaintiff was not at the time of the commencement of the action the owner or entitled to the possession of the harvester, and further found that the defendant was at the time the action was commenced, and still is, the owner and entitled to the possession of the harvester, and that the value thereof was one thousand dollars. Judgment was entered accordingly.

The plaintiff relies for recovery upon the following receipt or agreement:

“Stockton, Cal., August 4, 1893.

“Received of Houser, Haines & Knight one Haines-Houser improved combined harvester, No. —, for which, delivered at Stockton, Cal., upon the terms stated below, the undersigned agrees to pay to Houser, Haines & Knight the sum of fourteen hundred 00-100 dollars in U. S. gold coin as follows, to wit: \$500.00 by his note September 1, 1893; \$500.00 by his note September 1, 1894, to bear interest at the rate of ten per cent per annum from September, 1893, until paid, and \$400.00 by his note September 1, 1895.

“And it is agreed that said Houser, Haines & Knight do not part with the title to said harvester until all said deferred payments or notes are fully paid; that time is of the essence of the agreement; that should the undersigned make default in any of said payments, then said Houser, Haines & Knight shall, at their option, and without notice, terminate this agreement, and with or without legal process take and retain said harvester, wherever it may be situated, and all moneys paid by the undersigned prior to such default shall be compensation for the privilege of using said harvester prior to such default; and should Houser, Haines & Knight, by reason of such default, incur any expense, the undersigned agrees to reimburse them the sum total of all such expenses, including reasonable counsel fees. “I. M. ROWE.”

Indorsed: “The Houser & Haines Mfg. Co., by G. W. Haines, Vice-President.”

In pursuance of said receipt or agreement said Rowe at the same time as the date thereof executed the notes therein mentioned, and subsequently paid the sum of seven hundred and fifty dollars on the same.

The court, however, finds, and the evidence supports the finding, "That on the tenth day of June, 1893, Houser, Haines & Knight delivered to I. M. Rowe the harvester described in plaintiff's complaint upon the following order and the terms and conditions mentioned therein:

"\$1400.00.

"Messrs. Houser, Haines & Knight:

"Please ship to the undersigned one harvester, twenty-foot cut, including the usual extras (see printed list of extras furnished).

"Consign to I. M. Rowe, Athlone. For which the undersigned agrees to pay \$500.00 September 1, 1893; \$500.00 September 1, 1894, and \$400.00 September 1, 1895; all amounts due after September 1, 1893, to bear interest at ten per cent per annum until paid.

"Machine to be delivered free on board cars or boat in Stockton.

"These machines are all warranted to be well made, of good material, and durable, with proper care. If, upon one week's trial, the machine should not work well, the purchaser shall give immediate notice to said Houser, Haines & Knight, or their agent, and allow time to send a person to put it in order. If it cannot then be made to work to the entire satisfaction of the purchaser, he shall return it at once to the agent of whom he received it, and his payment, if any has been made, will be refunded. Continuous use of the machine, or use at intervals, through harvest season, shall be deemed an acceptance of the machine by the undersigned.

"Dated the 10th day of June, 1893.

"Postoffice, Minturn; county, Fresno; state, Cal.

"I. M. ROWE."

"That said harvester was delivered to said I. M. Rowe at Minturn, in the county of Fresno, that said I. M. Rowe then and there accepted said harvester, and at all times since said tenth day of June, 1893, up to June 2, 1896, said I. M. Rowe

retained and had possession, charge, and control of said harvester in said county of Madera."

The court also found that said Rowe gave in the harvester in question to the assessor of Madera county for the year 1896, and that it was sold for nonpayment of taxes thereon on June 2, 1896, and bid in by the defendant Hargrove, to whom a certificate of sale was issued by said assessor. The court also finds that on June 2, 1896, said Rowe executed a bill of sale of his right, title, and interest in said harvester to the defendant, and that thereupon the possession of said harvester was delivered to the defendant.

It appears, therefore, that upon June 10, 1893, said Rowe offered to purchase the harvester in question from Houser, Haines & Knight on the terms stated in his written offer, the machine to be delivered as therein stated. Houser, Haines & Knight accepted that offer by delivering the machine according to said offer. The sale, therefore, became complete on the delivery of the machine to Rowe. The character of the transaction was fixed at that date. After the purchase and receipt of the machine, as stated, Rowe used it for his harvesting that season for about two months before the receipt relied upon by the plaintiff was given. The instrument of August 4th says: "Received one Haines-Houser improved combined harvester, No. —, for which, delivered at Stockton, California, upon the terms stated below, he agrees to pay," etc. The offer to purchase and order for the machine of June 10th says: "Please ship one harvester, twenty-foot cut, including the usual extras."

It would appear from the language used in the two instruments that they referred to different machines, but the parties at the trial, and also on appeal, seemed to consider them as referring to one and the same machine. The instrument of August 4th is drawn as though the machine therein referred to was thereafter to be delivered. It says, "for which, delivered at Stockton," and also recites that Houser, Haines & Knight do not part with the title to the said harvester until all said deferred payments or notes are paid, etc., whereas the fact is, as already shown, that the machine in question had been shipped and delivered to Rowe under and in pursuance of his offer to purchase the same, and that he had been in possession of such purchaser and used such machine for

about two months prior to such receipt of August 4th. Both the title and possession of the machine had therefore become vested in Rowe long before this attempt to convert an absolute sale into a conditional sale. From the time the property was delivered to Rowe under his offer of purchase of June 10, 1893, up to the date of the sales to the defendant, three years thereafter, to wit, June 8, 1896, it had remained in the possession and under the control of Rowe as the apparent owner thereof. Conditional sales intended, as this evidently was, as security in lieu of a mortgage are not favored. As said in *Stockton Sav. etc. Soc. v. Purvis*, 112 Cal. 241¹: "By reason of the opportunities for fraud presented by this character of contract, courts are inclined to scrutinize them closely." (See, also, *Palmer v. Howard*, 72 Cal. 293.) In *Wright v. Vaughn*, 45 Vt. 369, it was said: "If one sell and deliver promptly to another absolutely, and the parties subsequently attempt to make a conditional sale, a change of possession is necessary as against creditors and vendees." In *Caraway v. Wallace*, 2 Ala. 542, it was said: "A contract absolute in its inception, and consummated by delivery, will not be converted into a conditional sale by an ambiguous phrase indorsed upon it afterward, even if such words would have been its effect if a part of the original contract."

We also think the defendant's title under the tax sale was good. The harvester was properly assessed to Rowe under section 3628 of the Political Code. It was in his possession and control when the tax accrued, and he had been invested with all the *indicia* of ownership by the act of the plaintiff and its assignors. The addition of other names to that of Rowe on the assessment-roll did not invalidate the assessment to him, and the sale (the property being personal) was properly made to the highest bidder, irrespective of the amount of the delinquent tax.

The court below correctly held, upon the facts found, that the sale to Rowe was absolute and not conditional; that plaintiff is not the owner or entitled to possession of the property in question, but that defendant is such owner and entitled to possession.

Order affirmed.

McFarland, J., Temple, J., and Beatty, C. J., concurred.

¹ 53 Am. St. Rep. 210.

[S. F. No. 1337. In Bank.—July 2, 1900.]

FIRST NATIONAL BANK OF SAN FRANCISCO, Appellant,
v. CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

TAXATION—NATIONAL BANKS—LIMITATION OF POWER OF STATE.—The right of the state to exercise its power of taxation over the property of national banks is limited and defined by section 5219 of the Revised Statutes of the United States; and the state can exercise no power of taxation not therein expressly permitted.

ID.—VOID ASSESSMENT OF PERSONAL ASSETS—RECOVERY OF TAXES PAID UNDER PROTEST.—An assessment of the personal assets of a national bank by the state is not permitted and is void; and taxes collected under such void assessment, and paid under protest, may be recovered back.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Lloyd & Wood, for Appellant.

Franklin K. Lane, City and County Attorney, and W. I. Brobeck, Assistant, for Respondent.

HARRISON, J.—The plaintiff is a national banking association, organized and existing under and by virtue of the laws of the United States, and having its principal place of business at the city and county of San Francisco. It brought the present action to recover from the defendant the sum of eight thousand two hundred and ninety dollars, paid by it under protest for taxes assessed and levied upon certain personal property owned by it on the first Monday of March, 1896, consisting of fixtures valued at three thousand six hundred dollars, and money on hand amounting to the sum of five hundred and eighty-nine thousand three hundred and thirty-three dollars. Upon the trial of the cause the court made findings of fact upon the issues before it, and rendered judgment in favor of the defendant. The plaintiff has appealed, bringing the cause here upon the judgment-roll alone.

The right of the state to exercise its power of taxation over the property of a national bank is limited and defined in section 5219 of the Revised Statutes of the United States. Under the provisions of that section the real property of the bank may be taxed "to the same extent, according to its value, as other real property is taxed," and the shares in the association may be assessed as other personal property, to the owners or holders thereof, and taxed in such manner as the legislature may determine and direct, subject to two restrictions not necessary to mention herein. As the authority of the state to tax the property of the association is derived under this section, it can exercise this power only to the extent and in the mode prescribed by the section. In *People v. National Bank etc.*, 123 Cal. 53,¹ it was held that the tax permitted by this section is the only tax which can be levied upon the property of the bank; that the provision for assessing the shares of the association to the owners or holders thereof is the only authority given to the state under which it may tax the personal assets of the bank, and that an assessment to the bank of its personal assets is void. The same ruling was afterward made in the circuit court of the United States for this district, in *San Francisco v. Crocker-Woolworth Bank*, 92 Fed. Rep. 273, and also by the supreme court of the United States in *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664. In the case last cited the court, after declaring that, were it not for the permissive legislation of Congress, a state would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets, or franchises, quoted the above section 5219 at length, and said: "This section of the Revised Statutes is the measure of the power of a state to tax national banks, their property or their franchises.. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders, and to an assessment of the real estate of the bank. Any state tax, therefore, which is in excess of and not in conformity to these requirements, is void."

The failure of the state to enact a law directing the manner or place of taxing the shares of the association does not jus-

¹ 69 Am. St. Rep. 32.

tify its officers in levying or collecting a tax for which there is no authority in law, even though it appear that the holder of the shares has thereby contributed no more to the expense of the government than he would have done under legal authority therefor. In *Owensboro Nat. Bank v. Owensboro*, *supra*, the court held that the contention herein urged, that a tax against the bank upon its personal assets was equivalent to a tax upon its shares, was untenable.

The judgment of the superior court is reversed, and that court is directed to enter judgment in favor of the plaintiff for the amount prayed for in its complaint.

Temple, J., McFarland, J., Van Dyke, J., and Henshaw, J., concurred.

[S. F. No. 2379. In Bank.—July 2, 1900.]

CITY OF OAKLAND et al., Petitioners, v. Hon. E. C. HART, Judge of Superior Court of Sacramento County, Respondent.

DISQUALIFICATION OF JUDGE—CONSENT OF PARTIES TO CALL IN QUALIFIED JUDGE—ESTOPPEL.—Where a disqualified judge calls in a qualified judge from another county, with the consent of both parties to a cause, for the trial thereof, the parties, after such qualified judge has begun to act in the cause without objection, are estopped from raising the objection that the disqualified judge had no power to select his successor, or to request another judge to sit in the cause.

ID.—JURISDICTION—PROHIBITION.—The case is not one to which the rule that consent will not confer jurisdiction is applicable; and the judge called in by consent of the parties being qualified to act, prohibition will not lie to prevent him from acting as judge in the cause.

PETITION for writ of prohibition to prevent the respondent from trying a cause in the Superior Court of Alameda County. E. C. Hart, Acting Judge.

The facts are stated in the opinion of the court.

W. A. Dow, City Attorney of Oakland, and R. Y. Hayne, for Petitioners.

Garret W. McEnerney, for Respondent.

Page, McCutchen, Harding & Knight, and A. A. Moore,
for Contra Costa Water Company.

THE COURT.—This is an original petition in this court for a writ of prohibition prohibiting and restraining the respondent from any further acting as judge in a certain action pending in the superior court of the county of Alameda, in which the Contra Costa Water Company is plaintiff and these petitioners are defendants.

The facts necessary to be stated are these: The said action of the Contra Costa Water Company against these petitioners (the City of Oakland et al.) was brought to restrain the defendants therein from enforcing a certain ordinance fixing the rates to be charged for water furnished by the said Contra Costa Water Company to the city of Oakland. It was brought in the superior court of the county of Alameda, and assigned to Department Three of that court, of which the Hon. F. B. Ogden is presiding judge. When the pendency of this action was first called to the attention of Judge Ogden, in April, 1900, he suggested to counsel for the respective parties that he considered himself disqualified to try the case because he was a rate-payer for water furnished by said water company, and suggested that counsel agree upon some other judge to try the case. He suggested, also, that two of the other judges of Alameda county were also disqualified for the same reason; that Judge Green of said county was not disqualified, but he was too busy and crowded with other cases to try said case; but that if counsel consented the case might be transferred to Judge Green and he could select another judge. To this the attorney for the defendants (petitioners here) stated that he did not desire the matter to take that course, but did desire that Judge Ogden himself should select the judge; and that he (the attorney) did not desire to take the responsibility of agreeing upon another judge, but would consent to whatever judge might be named by Judge Ogden. The matter was mentioned several times with the same result; and on May 7, 1900, Judge Ogden, with the knowledge and consent of the attorney for the defendant therein, as well as with the

consent of the attorney for the plaintiff, wrote the following telegram to be sent to the respondent herein:

"May 7, 1900.

"To Judge E. C. Hart, Sacramento, Cal.:

"All counsel in case of *Contra Costa C. W. Co. v. City of O.*, as well as judges of this county, unite in request that you sit in said cause. Judge here is disqualified. If you accept, can you be here Wednesday morning to hear demurrer?

"F. B. OGDEN."

This telegram was sent to the other three judges of the superior court of Alameda county and was signed by Judge Green and Judge Ellsworth, the other judge not being found. It was returned to Judge Ogden and a pencil mark was made across the names of the other two judges, Judge Ogden thinking that the dispatch ought to be sent in his name alone. This telegram was delivered to the attorney of the defendant and one of the attorneys of plaintiff in said case, and was by them taken to the telegraph office and forwarded to the respondent at Sacramento. This selection of the respondent, Judge Hart, was consented to by the attorney of the defendants; this fact appears not only upon the face of the telegram itself, which was delivered to the attorney for the defendants and by him and the other attorney forwarded, but also by the testimony in the case, which was submitted by consent on the hearing of this application. It was thought best to get a judge from Sacramento because, as Sacramento had its own waterworks, there were no questions in that county about fixing rates. The respondent Hart immediately telegraphed to Judge Ogden that he would accept the appointment and would be in Oakland on the next Wednesday morning, and was there at that time. Judge Ogden accompanied the respondent to the bench of the court and introduced him to the attorneys as Judge E. C. Hart, who had been selected to try the case. No objection whatever was made by the attorney for the defendants therein to Judge Hart sitting in the case; and Judge Ogden caused the clerk of the court to enter the following order: "The demurrer and the motion herein coming on regularly this day for hearing, whereupon Hon. E. C. Hart, judge of the superior court of Sacramento, was requested by counsel for the plaintiff and defendant herein to act

in the above-entitled cause, three of the judges of the court being disqualified, and Judge Hart having consented thereto, it is ordered that the matters herein be and the same are hereby continued to Wednesday, May, 19, 1900." A demurrer to the complaint, having been interposed, was argued before Judge Hart, who took the same under advisement and afterward made an order overruling the same, and giving the defendants certain time to answer. Other matters were submitted and considered, without any objection to the respondent acting, before additional counsel was retained by the defendants therein; afterward additional counsel was employed by defendants, and "thereafter all of said attorneys and counsel for the defendants in said cause took part in several interlocutory applications in the same before the Hon. E. C. Hart without any objection." Thereafter a motion was made by defendants to compel the plaintiff to submit certain books to inspection, and this motion was submitted to Judge Hart, who afterward denied the same, but on application of defendants added to the order that it was made without prejudice to a renewal of the motion. This occurred about the 11th of June, 1900, down to which time no objection whatever had been made to Judge Hart sitting in the case; but on June 12, 1900, for the first time, counsel for defendants in said cause objected to the further action of respondent as judge in the cause, and to his hearing or determining any matter or proceeding therein; and after testimony and argument the objection was overruled by respondent. Thereafter this present proceeding for a prohibition was instituted in this court.

The position of the petitioners here is that Judge Ogden was disqualified from trying the case because he was a water rate-payer; that for the same reason he had no jurisdiction to request another judge to sit; and that his act in requesting the respondent to sit as judge of the superior court of Alameda county was without jurisdiction, and that the consent of the parties could not give it validity. As both sides assume that Judge Ogden was disqualified to try the case because he was a rate-payer, we will assume that proposition to be true for the purposes of this case, although we are not to be understood as definitely determining that question. Neither are we at all inclined to hold that Judge Ogden, even if disqualified

to try the case, could not have legally called in the respondent to hear and determine the case in question without any request or consent of the parties, for the constitution provides, without any qualification, that "a judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof"; but it is not necessary to consider that proposition, because here the respondent was called to try the case with the consent, and practically at the request of the petitioners. This is not a case to which the rule applies that consent cannot give jurisdiction. It is, for instance, not a case like *Bates v. Gage*, 40 Cal. 183, where it was sought by stipulation to give the district court jurisdiction to sit in a certain county at a time when it had no jurisdiction to sit there, and where it was said that consent of parties could not confer jurisdiction upon a court "when, in the nature of things, it could acquire no jurisdiction—they could not by their stipulation make a court." In the case at bar, the superior court of Alameda county had full jurisdiction of the subject matter of the action and of the parties, and the respondent was a duly elected and acting superior judge, qualified officially to preside in that court. There was no disqualification attaching to him personally, and therefore the question whether consent can confer jurisdiction upon a personally disqualified judge does not arise. Therefore, the petitioners, having requested Judge Ogden to select a judge, and having approved the selection which he made, and carried his request to the respondent, and having proceeded with the hearing of the case before the respondent without objection until important matters had been disposed of, cannot now be heard to repudiate their own act. We have been referred to no case where it has been held that a party, having consented to the calling in of a qualified judge to preside over a court having competent jurisdiction of the case, can in the midst of the hearing of the action stop further proceedings upon any such suggestion of the irregularity or invalidity of the manner in which he was called in as is made in the case at bar. The case of *Lillie v. Trentman*, 130 Ind. 16, is very similar to the case at bar. There the regular judge, being disqualified in a certain case, had called in another judge to try it, and one of the parties having made no objection until cer-

tain matters in the case had been determined, then objected to his finally disposing of the case. The court having intimated that it might presume that the order calling in the special judge was legally made, but that it did not care to put its decision on that ground, said: "What we do decide is that when a judge has been called or an attorney has been appointed to try a cause, as provided in section 415 of the Revised Statutes of 1881, and no objection is made to his appointment at the time, or to his sitting in the cause at the time he assumes jurisdiction, all objections to the regularity, of such appointment shall be deemed waived. A practice that would permit a party litigant to proceed for months before a *de facto* judge, to make issues, and obtain rulings upon legal questions involved in the controversy, and then, if not satisfied with some of his rulings, or not disposed to go into trial when the cause is ready for trial, would be able, in a moment, to arrest proceedings and oust the jurisdiction of the judge, cannot be tolerated." In *Field v. Mark*, 125 Mo. 502, where the regular judge of the court was disqualified on the ground of interest, and had appointed another judge to try the cause, with the consent of parties, the court said: "He could have called in another judge without consulting the other side; but when, as the record shows, he consulted their wishes, and they agreed with him upon Judge Sloan, the point is without merit either in ethics or law." Our conclusion is, that the petition for a peremptory writ should be denied.

The foregoing views make it unnecessary to consider the question whether or not Judge Green, who was free from all color of disqualification, did also request respondent to act as judge of the superior court of Alameda county in the case in question. We see nothing in the point attempted to be made that when Judge Ogden sent the dispatch to the respondent he thought that the latter was the person who had formerly been attorney general of the state. He intended to request the person who was superior judge of the county of Sacramento; and, when the latter appeared at Oakland to take his seat as judge in the superior court there, the events which then took place constituted of themselves a request that the respondent

act as judge—all of which was with the additional knowledge and consent of counsel for petitioners.

Respondent had no intimation that he was objectionable to either party until June 12th. If petitioners, instead of consenting that respondent be called in, and really requesting it to be done, had objected to him before any proceedings were had in the case, he would have been free to refuse to act if he had preferred to take that course; but in the present condition of the case it would, no doubt, be somewhat embarrassing for him to retire without consent of both parties.

The prayer of the petitioner is denied, and the proceeding is dismissed.

BEATTY, C. J., concurring.—I concur in the judgment and generally in the foregoing opinion, but am unwilling to assent to the view intimated therein that Judge Ogden could have called in another judge of his own selection without the consent of the parties. The course that should have been pursued was that originally proposed by Judge Ogden, viz., to send the cause to Judge Green's department, not because the case was governed by the express provisions of subdivision 4 of section 170 of the Code of Civil Procedure, as amended in 1897 (Stats. 1897, p. 287), for it is at least doubtful if that amendment applies except in cases of actual bias on the part of the judge; but the transfer should have been made to Judge Green's department, because it has been held here that in a county where there are several departments of the superior court the disqualification of the judge to whose department a particular cause has been originally assigned is no ground for a change of venue if there is another judge of the same court before whom it may be tried. (*Oakland v. Oakland Water Front Co.*, 118 Cal. 251.) The only ground upon which that decision can be supported is that it is the duty of the superior court in the case supposed to reassign the cause to a department whose judge is not disqualified, for otherwise there could be no trial at all, or else the parties would have to await the assignment of a judge by the governor, or submit to the selection of a judge by a judge himself disqualified and possibly deeply interested in the result of the trial. I do not think the law intends that a litigant

should ever be placed in such a dilemma, and, according to our repeated decisions, he cannot be so placed in a county where there is but one judge of the superior court. There, if the judge is disqualified for interest, consanguinity, or other cause, either party may move for a change of venue, and the motion must be granted without hesitation or delay. (*Krumdick v. Crump*, 98 Cal. 117; *Anaheim Water Co. v. Jurupa Co.*, 128 Cal. 568.) Nor can the right to a change of venue be defeated by the act of the disqualified judge in calling in another judge to hear the motion. This was expressly decided in *Remy v. Olds* (Cal., Nov. 4, 1895), 42 Pac. Rep. 239, but since a rehearing was granted in that case and the controversy settled by the parties it cannot be cited as authority. In a more recent case, however, the principle upon which *Remy v. Olds*, *supra*, was decided has been affirmed in emphatic terms: "The reason why the judge of the county cannot call another to try the case is stated in *Krumdick v. Crump*, *supra*. It is that the judge shall neither try his own case nor select his judge." (*Santa Cruz Bank v. Taylor*, 125 Cal. 249.) This is the controlling principle, and it applies in all counties alike whether there be one department of the superior court or more than one department. No litigant can be compelled to accept a judge selected by a judge himself disqualified. He can always defeat such an attempt by moving, and insisting upon his motion, for a change of venue.

But it does not follow from this that a disqualified judge cannot, with the express consent of the parties, call in a judge from another county to try the cause, instead of transferring it to another county for trial. In case of a change of venue it is made the duty of the judge to transfer the cause to the county agreed upon by the parties, and there is no reason why they should not be allowed to agree that, instead of changing the place of trial, the judge by whom they are both willing the cause may be decided should come to the county where it is pending and conduct the trial there. The convenience of witnesses and the saving of expense would often be controlling reasons for such a course.

But the contention on the part of petitioners is that the plain words of the statute take from the disqualified judge

the power to invite another judge to preside in his place, even with the express consent of the litigants. To do so, they contend, would be to "sit or act" in the case in a matter not included in the exceptions enumerated in section 170 of the Code of Civil Procedure. I do not construe the last clause of that section as an enumeration of exceptions to the rule against sitting or acting in a cause, but rather as a legislative declaration that the words "sit" and "act" are not used in a sense which would embrace the arrangement of the calender, the regulation of the order of business, or the transferring of the action or proceeding to another court. This clause means nothing more than if it had said: But this inhibition shall not be construed as applying to the arrangement of the calender, etc., and this is very different from an exception which strengthens the rule. It gives a sense to the words "sit" or "act" which excludes an order transferring the cause and all similar orders; and an invitation to a judge agreed upon by the parties is precisely analogous to an order transferring the cause to a county agreed upon. It is not sitting or acting in the cause in the sense of the statute.

In this case I consider that Judge Hart was invited by consent of the parties, and that at all events it was too late to object to his acting in the cause after the parties had voluntarily argued and submitted the demurrer to his decision. When another judge has been invited to try a cause by a disqualified judge the remedy for a dissatisfied litigant is to move for a change of venue. If he waives that remedy, if he consents either expressly or impliedly to the selection of the judge so invited, he cannot claim that his trial of the cause is an excess of jurisdiction.

[L. A. No. 629. Department Two.—July 9, 1900.]

F. W. BRAUN et al., Respondents, v. H. J. WOOLLACOTT et al., Appellants.

PARTNERSHIP—ACTION ON BOND OF CONSIGNEE—PLEADING—CONTINUANCE OF PARTNERSHIP.—In an action by members of a partnership against the sureties on the bond of a consignee, a complaint which averred that "during all the times hereinafter mentioned, they were copartners doing business under the firm name and style" designated, and that "ever since" a day specified the consignee named "failed and refused to account for any portion of said balance" specified which "is yet due and unpaid," may be fairly said to show a continuance of the partnership from the first time mentioned in the complaint to the commencement of the action.

ID.—EXPIRATION OF TERM—NEW FIRM—WINDING UP FORMER BUSINESS—COLLECTION OF ACCOUNTS.—Notwithstanding the expiration of the term of the original partnership, and the purchase of the interest of one of the members, and the formation of a new partnership by other members, it being agreed that certain accounts not assumed by the new partnership, including the account in suit should belong when collected to the former partnership, it was competent for the partners to treat the former partnership as continuing for the purpose of winding up its business and collecting the account in suit.

ID.—BOND GIVEN TO PARTNERSHIP—ACTION IN FIRM NAME AFTER DISSOLUTION.—Where the bond sued upon shows upon its face that it was given to the partnership bringing the action, the action may be brought thereon by the partners in the copartnership name, notwithstanding the previous dissolution of the partnership by the expiration of the term limited therefor.

ID.—CONTINUING POWER OF PARTNERS AFTER DISSOLUTION.—The powers of the partners with respect to rights created pending the partnership remain after dissolution.

ID.—AGREEMENT OF PARTNERSHIP TO CONSIGN MERCHANDISE—CONSTRUCTION OF BOND OF CONSIGNEE.—Where the partnership made an agreement for a term of one year to consign a stock of merchandise and such other goods as the parties might after its date agree upon, to be handled by the consignee on consignment only, etc., a contemporaneous bond given by the consignee to the partnership for the faithful discharge of all his duties as consignee, and to account for all money, and all property, goods, and chattels and other things which might come into his possession or under his control as such consignee, within a limit of two thousand dollars, is to be construed as applying to all goods consigned and accepted on con-

signment during the life of the contract, and as standing for the faithful performance of all the covenants of the consignee, not exceeding the limit of two thousand dollars.

ID.—PAROL EVIDENCE—EXPLANATION OF UNAMBIGUOUS CONTRACT.—The contract and bond being unambiguous in their terms, parol evidence is inadmissible to show the meaning of the phrase "stock of merchandise" used in the contract, and that the contract and bond were understood by the parties to be limited to the first "stock of merchandise" furnished to the consignee to enable him to open up business, and to mean that no more merchandise than two thousand dollars in value was to be furnished to him.

ID.—PLEADING—INCOMPETENT DEFENSE—PROPER EXCLUSION OF EVIDENCE—CONVERSATIONS PRIOR TO WRITTEN CONTRACT.—The fact that the answer alleged as matter of defense facts which were irrelevant, immaterial, and incompetent, in regard to the construction of the contract and bond, and as to what they were intended to cover, cannot justify parol evidence to show conversations between the parties prior to the execution of the written contracts, for the purpose of interpreting them contrary to their unambiguous meaning.

ID.—LIABILITY OF SURETIES OF CONSIGNEE—HANDLING OF GOODS BY PARTNERSHIP.—The goods having been consigned to the consignee personally in pursuance of the contract, the sureties on his bond are liable for his failure to account therefor within the limit of two thousand dollars, and it is immaterial that the goods were in fact handled by a partnership of which he was a member.

APPEAL from an order of the Superior Court of Los Angeles County denying a new trial. M. T. Allen, Judge.

The facts are stated in the opinion of the court.

T. E. Gibbon, and Charles T. Howland, for Appellants.

Borden & Carhart, Sheldon Borden, and Walter Rose, for Respondents.

CHIPMAN, C.—Action against defendants as sureties on a bond executed by one A. J. Newton for the faithful performance and accounting to plaintiffs by him as consignee of certain goods. Plaintiffs had judgment, and defendants appeal from an order denying their motion for new trial.

1. It is contended that the complaint does not state a cause of action because it fails to show that plaintiffs were

copartners when the action was commenced, and is therefore fatally defective. (Citing *Affierbach v. McGovern*, 79 Cal. 268; *Fredericks v. Tracy*, 98 Cal. 658; *Holly v. Heiskell*, 112 Cal. 174.) The point was raised at the trial by an objection to any testimony being introduced by plaintiffs for the reason above stated; there was no demurrer to the complaint. The court found that plaintiffs had capacity to maintain the action as copartners, and this finding is also attacked; the two points will be considered together. The allegation of the complaint is: "That during all the times hereinafter mentioned they [plaintiffs] were copartners doing business under the firm name and style of F. W. Braun & Co."

The cases cited were actions to recover possession of personal property, and it was held that the complaint must show right of possession when the action is commenced. The allegation of the complaint covers all the times mentioned therein, and these dates embraced the transactions sued upon.

There is also an allegation "that said Newton has ever since said twenty-sixth day of December, 1894, failed and refused to account for any portion of said balance, . . . and the said balance, to wit, the sum of five hundred and ninety-seven dollars and fifty cents, is yet due and unpaid on said account." We think the allegation that plaintiffs "during all times hereinafter mentioned were copartners," etc., may fairly be said to include the times above stated during which the account sued for remained due and unpaid, and this included the filing of the complaint.

The court found that plaintiffs were copartners at the time of the execution of the bond sued upon, and "that as to the cause of action sued there has never been any dissolution of said copartnership, and the same has ever since continued in existence, and still continues to exist." It appeared that on December 31, 1894, a written agreement was executed by all the copartners by which Brunswig purchased Finley's interest in the firm, and that on that day the copartnership contract expired. All doubtful claims due the old firm were by the agreement to be passed to profit and loss before the firm books were to be balanced, "and all said accounts or notes must be given immediately to reliable attorneys for collection by suit, proceeds of which to be divided *pro rata* between us

when received." Braun, one of the firm, testified that the account here in controversy was rejected by the new firm and passed to attorneys for collection, and that there has never been any other dissolution of the copartnership except as in the agreement set forth. "As to those accounts we have had no final settlement." Appellant contends that the contract entered into by the partners included in the assignment to the new firm all the doubtful accounts. Finlay was to receive a stated sum in money, which was paid, and it was also provided: "The balance due me [Finlay] for interest on capital, and for profits for the year 1894, as will appear when said books are balanced, to be immediately paid to me also by said L. N. Brunswick." Following this was a provision that in ascertaining the profits the new firm should have the right to reject accounts "they may deem doubtful or not collectible," and these were to go to profit and loss, and to belong to all the original partners when collected. We think the trial judge rightly held this contract to mean that as to these doubtful accounts they were to belong to all the partners, and as to them that the partnership continued for the purpose of enforcing collection by suit or otherwise.

It does not appear, except by a recital in the agreement of sale to Brunswick, just when the partnership expired, and it is only from the agreement that we can determine that the partnership had expired by limitation. Assuming that it had so expired, it was competent for the parties to treat it as continuing for the purpose of winding up the business, and this, it seems to me, may fairly be inferred was the intention. The bond given by defendants on its face shows that it was given to the firm, and we see no reason why the action might not be brought in the name of the partners suing in their copartnership capacity.

In *Busfield v. Wheeler*, 14 Allen, 139, the case was that of a debt to a copartnership secured by lien. The claim had been assigned to one of the partners on dissolution and the action was subsequently brought in the name of the firm. The court said: "The debt, and the lien for its security, accrued to the copartnership. All proceedings for enforcement of the claim must be had in the name of the copartnership, notwithstanding its dissolution and the assignment of his

interest by one copartner to the other. The remaining partner takes all the rights of the firm, and may exercise them in the name of the firm, for all purposes necessary for their enforcement and for closing up the joint business. The demand was properly made, therefore, by Busfield in the name of the firm; and the statement that the whole interest belonged to himself does not injure its effect." That the action may be brought in the name of the copartnership, see *Peacock v. Peacock*, 15 Ves. 49; *Crawshay v. Maule*, 1 Swanst. 495, 506, et seq.; *Ex parte Williams*, 11 Ves. 3; *Molen v. Orr*, 44 Ark. 486; *Holmes v. Shands*, 26 Miss. 639.

The rule is similarly stated in Lindley on Partnership, volume 1, star section 217. Mr. Collyer says that "the powers of partners, with respect to rights created pending the partnership, remain after dissolution." (Collyer on Partnership, secs. 186, 199, cited in *Osement v. McElrath*, 68 Cal. 466.¹)

2. It is contended that the court erred in holding that the bond covered a continuous furnishing of goods by plaintiffs to Newton and in not restricting the contract to the first consignment. It appears that plaintiffs agreed in writing on January 11, 1894, to deliver to Newton on consignment certain merchandise on condition that he would, before the agreement was to go into effect, make a bond with two sureties satisfactory to plaintiffs for the faithful performance of the agreement. Newton furnished the bond, now in suit, on January 17, 1894, and on the 18th or 19th of January plaintiffs made the first delivery of goods. Deliveries continued from time to time under the agreement until December 1, 1894, the total amounts being four thousand four hundred and forty-eight dollars and sixty-eight cents, of which Newton paid three thousand eight hundred and fifty-one dollars and eighteen cents, leaving unpaid five hundred and ninety-seven dollars and fifty cents, for which the action was brought.

Both parties treat the written agreement between Newton and plaintiffs and the bond executed by defendants as contemporaneous agreements to be considered together. The agreement to consign goods was to continue in force for one year, and was dated January 11, 1894. It contained the following: "That the said first parties [plaintiffs] agree to deliver to their place of business in Los Angeles, to A. J. New-

¹ 58 Am. Rep. 17.

ton, a stock of merchandise consisting principally of paints and paint goods, and such other goods as the parties may hereafter agree upon, said goods to be handled by said second party on consignment only"; the ownership of the goods was to remain in first parties until sold and paid for, and Newton had the right to sell in the course of trade, "and all goods sold in each month shall be paid for in cash on or before the 10th of the succeeding month at the invoice price. And the said second party agrees to take an inventory of stock on hand the 1st of each month, and report to said first parties on or before the 10th of each month the amount of goods on hand the first day of the month, and amount of sales at invoice price during the preceding month." First parties also had the right "to investigate the stock on hand in possession of second party, and also the books of account to verify the statements as to the stock on hand and sales, hereinbefore provided for," etc. The bond contained substantially the same provisions and provided that "if the said Newton shall well and faithfully discharge his duties as such consignee, and shall also account for all moneys and all property, goods, and chattels, and other things which may come into his possession or under his control as such consignee, then the above obligation to be void, otherwise," etc.; the limit of liability was two thousand dollars. Deliveries of goods, under the contract, did not reach the limit until in April. Payments were made and accounts rendered by Newton and goods were delivered to him from time to time until December, when he failed and became insolvent, at which time he owed the amount now claimed. Appellants contend that the bond limits their liability "to the first stock lot or supply of goods delivered by plaintiffs to Newton for the purpose of enabling him to open business and for stocking his store to that end." We are cited to lexicons for the meaning of the word "stock." The definitions given do not confine the meaning to the goods with which the merchant begins business, but rather to the goods he employs in trade. I do not see that the dictionaries throw any light upon the meaning of the bond or agreement.

Without going into an analysis of the various clauses of the bond and agreement which bear upon the point, it seems evident from the contracts themselves that the intention of the

parties was that during the life of the bond plaintiffs were to consign to Newton as his requirements demanded and as the parties might agree, and defendants, as sureties, stood for Newton's faithful performance of his covenants within the limit of two thousand dollars. In this view of the agreement, which was the view of the trial court, it was not error to refuse the evidence offered by defendants to show the meaning of the phrase "stock of merchandise," and that the contracts were understood to mean that no more than two thousand dollars in value were to be furnished to Newton. Other questions similar in character and involving the same principle were rightly refused. Nor was it material that Newton had a partner in business, and that this copartnership handled the goods. They were sold to Newton; the contract was with him and the account was kept with him, and to him alone plaintiffs look for their money. It was immaterial how he disposed of the goods or to whom, so long as he paid for them according to his contract. Defendants alleged in their answer, among other things, that the bond was given to secure the payment of a single stock of goods, and that it was not intended to cover or secure the payment for any future sales and delivery of goods, and that it was the intention of defendants, when executing the bond, that when the first stock of goods furnished was paid for, the bond should thereby be satisfied, and all liability of defendants would thereupon cease. It was to prove these allegations of the answer that defendants offered to show the intention of defendants by conversations had between the parties prior to entering into the contracts. We can discover no such ambiguity in either of the instruments as would warrant us in holding parol evidence admissible to explain their meaning, or to show the intention of the parties in entering into them. The fact that the answer alleged facts which were irrelevant, immaterial or incompetent as a defense gave no right to establish them by proof, and it was not error to exclude the evidence sought to be introduced to establish such facts.

We advise that the order be affirmed.

Gray, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed.

McFarland, J., Temple, J., Henshaw, J.

[L. A. No. 705. Department Two.—July 9, 1900.]

MILTON WOLFSKILL, Appellant, v. LOS ANGELES
RAILWAY COMPANY, Respondent.

NEGLIGENCE—FINDINGS—SUFFICIENCY OF EVIDENCE—SUPPORT OF JUDGMENT.—In an action for a personal injury alleged to have been caused by the negligence of the defendant, in order to support a judgment for the plaintiff, it must appear both that the defendant was negligent and that the plaintiff was free from negligence, if there is no evidence tending to show that defendant's conduct was wanton or willful. But, in order to support a judgment for the defendant, it is sufficient if it appears either that the plaintiff was negligent, or that the defendant was free from negligence, and it is not necessary that findings upon both of these points should be sustained by the evidence.

ID.—INJURY FROM FRIGHTENED HORSES—CONFLICTING EVIDENCE.—Where the plaintiff was injured from being struck by frightened horses driven by the defendant, and the court found that at the time of the injury the driver of the team was free from negligence, and that the plaintiff was then negligent in going in front of the horses as they approached him, without looking or taking care to avoid being run against by them, and the evidence was substantially conflicting upon both points, the decision in the trial court as to the weight of the evidence cannot be reviewed upon appeal; and there being some evidence to justify the findings, the judgment for the defendant cannot be disturbed.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Walter Van Dyke, Judge.

The facts are stated in the opinion.

S. O. Houghton, and Charles D. Houghton, for Appellant.

Bicknell, Gibson & Trask, for Respondent.

CHIPMAN, C.—Action for personal injury. Jury trial was waived; the trial was by the court, and defendant had judgment. The appeal is from the judgment and from the order denying plaintiff's motion for a new trial. The injury occurred at the crossing of Aliso and Alameda streets in the city of Los Angeles. A team of horses, owned by defendant, was

being driven by an employee of defendant along Alameda street at a point where the track of the Southern Pacific Company's railroad runs along the middle of said street. The driver was going north along the east side of the street, but as he came near Aliso street, noticing a train of cars coming toward him, he crossed the track, for some unexplained reason, to the west side of Alameda street, and continued along that side of the latter street toward the crossing of Aliso street. Plaintiff was a flagman of the Southern Pacific Company, and his duty was to flag trains at this crossing. Defendant's evidence showed that plaintiff started from the curb on the west side of Alameda street, and near the crossing of the two streets, to go toward the middle of Alameda street about the time defendant's horses were approaching the corner. The horses became frightened by the train at that moment coming along Alameda street; the horses shied away from the train and toward the curb, and in doing so the near horse struck the plaintiff and knocked him down, thus injuring him.

The court, in its second and third findings, found in effect: 1. That at the time of the injury the team was not being driven carelessly or negligently, nor at a speed dangerous to the lives or limbs of persons on said Alameda street, and that the driver exercised due care and was not guilty of any negligence; 2. That at the time plaintiff received the injury he was not exercising ordinary care, and was guilty of negligence in this: "That he went in front of said pair of horses as they approached him, and did not look out to avoid being run against by them, and did not pay attention to the approach of said horses and said wagon, and did not take any care or caution whatever to avoid being run against by said horses."

The ground of the appeal is that the evidence does not support these findings. It is not necessary that the evidence should sustain both these findings in order to support the judgment. To have found for plaintiff it must have appeared that defendant was negligent and that plaintiff was free from negligence, there being no evidence tending to show that defendant's conduct was wanton or willful.

The evidence is sharply conflicting upon some material points touching plaintiff's negligence in not heeding the

warning given him, and as to the want of care on the part of defendant's driver. It was the province of the court to reconcile the conflicts and pass upon the weight to be given the evidence. We can do no more than look into the evidence far enough to discover whether or not there was sufficient to sustain the findings.

The driver testified that when he first saw plaintiff he (plaintiff) was standing at the southwest corner of the two streets, and that he was walking very slowly toward the middle of Alameda street; witness testified that the thought he was about to stop; witness thought there was plenty of room to pass plaintiff. "The train frightened my horses, and they crowded over toward him, and the near horse struck him." He was asked when he observed plaintiff's dangerous position if he could stop his horses, and answered: "No, sir, not at that time. I was using every effort to do so. The horses were frightened by the engine. . . . I have handled teams ever since I was old enough to handle them, and I am thirty-six years old. I hallooed at this man. Mr. Hartwell (who was in the wagon) hallooed at the top of his voice. When we hallooed at him he had plenty of time to get out of the way." The witness Hartwell testified: "As we got pretty near to the corner the flagman [plaintiff] stepped down from the curb to walk out toward the center of the street, and the horses struck him with their breasts and run over him. To attract his attention we called to him to look out, or 'hello,' or something to that effect. I did so. . . . The driver hallooed. The horses were frightened on that occasion. . . . The occasion of their fright was the train passing—the engine and cars. . . . I saw him step down from the curb before we got there. When he was hit I should say he was some four or five feet from the curb. The driver at the time was trying to pull the horses away from him. He was walking slow. . . .

We were, I could not say how far, some forty feet—thirty or forty feet—from the southwest corner of the street when I first saw Mr. Wolfskill. I was sitting by the side of the driver in front. . . . When I first saw Mr. Wolfskill he was on the walk. The train was coming and he stepped down—the train was coming from the north. . . . Question by the Court: Did that train cause the shying to occur? A. Yes, sir." The witness Hubbard, who was in the wagon, testified: "We went north on Alameda street, and on the

east side of the street, somewhere between Commercial and Aliso, we crossed from the east to the west side. When near the corner of Aliso and Alameda the train came along and scared the horses. They started, and the driver done all he could to hold them, and the flagman was standing out somewhere near the corner, and they hollered at him to look out. Apparently he didn't seem to move, and the neckyoke of the wagon hit him and knocked him down and the near horse stepped on him." He testified that the horses appeared to be frightened at the approaching engine. "Question. Could he have gotten out of the way when they hollered at him? A. I believe he could if he had tried." Plaintiff's evidence tends to contradict the facts as above narrated in some particulars, and it tends in some degree to show carelessness on the part of the driver and to exculpate plaintiff from the charge of having contributed to his injury by his want of care. The question, however, of the weight of the evidence and as to where the preponderance lay, and as to how far the statements of witnesses were to be taken as true, was for the trial court to determine and cannot be reviewed here. We think there was sufficient evidence to justify the findings, and the judgment and order must therefore be affirmed, and so we advise.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[Crim. No. 624. Department Two.—July 9, 1900.]

THE PEOPLE, Respondent, v. MARVIN VANN, Appellant.

CRIMINAL LAW—ASSAULT WITH INTENT TO COMMIT RAPE—CONSENT OF GIRL UNDER AGE OF CONSENT.—Upon the trial of a defendant accused of an assault with intent to commit rape upon a girl under the age of consent, the fact that the girl went voluntarily to the room of the defendant by previous appointment, and made no resistance, is immaterial, and can constitute no defense to the charge. The law, in such case, conclusively implies incapacity of the girl to give consent; and the law resists for her, regardless of her actual state of mind at the time.

ID.—EVIDENCE—AGE OF PROSECUTRIX—MEMORANDA—ENTRY IN BIBLE—PHYSICIAN'S CASH-BOOK.—The mother of the prosecutrix, in testifying to her age, may refresh her memory as a witness from an entry made by her in the family Bible shortly after the birth; and the physician who attended at the birth may refresh his memory as a witness from an entry made by him at the time in his cash-book. It is not necessary that such written memoranda should be admissible in evidence.

ID.—ADMINISTERING WINE TO PROSECUTRIX—UNTENABLE OBJECTION TO EVIDENCE.—Evidence is admissible to show that about one hour before the assault the defendant gave wine to the prosecutrix, which she drank. It is not a tenable objection to such evidence that it may tend to prove that defendant administered intoxicating narcotics with intent to prevent the prosecutrix from resisting, and that defendant is not charged therewith in the information.

ID.—MISCONDUCT OF DISTRICT ATTORNEY—REQUEST TO BYSTANDERS—QUESTIONS TO WITNESSES.—Where it appears that the court carefully guarded the rights of the defendant, and that the district attorney did not act through passion or prejudice, or with intent to injure the defendant, it was not prejudicial misconduct for him to request the bystanders to retire while the prosecutrix was testifying, nor to ask objectionable questions to witnesses, which could not have injured the defendant.

APPEAL from a judgment of the Superior Court of Colusa County and from an order denying a new trial. H. M. Albery, Judge.

The facts are stated in the opinion.

Milton Shepardson, for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

COOPER, C.—Defendant was convicted of an assault with intent to commit rape. He appeals from the judgment and from an order denying his motion for a new trial.

The evidence shows that the person upon whom the alleged assault was made was a girl under sixteen years of age; that she went voluntarily to the room of defendant by previous appointment, and made no resistance.

1. It is claimed that the verdict is contrary to the evidence. The argument is, that although under the statute a girl under the age of sixteen is incapable of consenting to the crime of rape, yet if she consents to the attempt it is no assault, because an assault implies that the party assaulted was not soliciting but resisting the assault. This question has been decided as contended for by defendant by several decisions of able courts. It has also been held by many decisions of the highest courts of the states that where the female under the law is incapable of consenting to rape she is equally incapable of consenting to an attempt to commit it. The latter view has been adopted in this state. (*People v. Gordon*, 70 Cal. 467; *People v. Verdegreen*, 106 Cal. 211; *People v. Gomez*, 118 Cal. 327; *People v. Roach*, ante, p. 33.) The rule is well stated in *People v. Verdegreen*, *supra*, where it is said: "It is true that an assault implies force by the assailant and resistance by the one assaulted; and that one is not, in legal contemplation, injured by a consensual act. But these principles have no application to a case where under the law there can be no consent. Here the law implies incapacity to give consent, and this implication is conclusive. In such case the female is to be regarded as resisting, no matter what the actual state of her mind may be at the time. The law resists for her."

2. It is claimed that the court under defendant's objection admitted in evidence an entry in the family Bible for the purpose of proving the age of the person assaulted, and that such ruling was error. Upon a careful examination of the record we do not find that the family Bible or any entry therein was admitted in evidence. The mother of the girl testified that her daughter was born on the second day of August, 1884, and that on the fifteenth day of October, 1899, she was fifteen years and three months old. She was then asked if at the time of the birth of her daughter she made

any data or memoranda, and answered: "Yes, sir; shortly after Neva was born, as soon as convenient, I made an entry, in my own handwriting, in the family Bible."

"Q. And your testimony as to the time of her birth is from the memoranda which you made at the time in the Bible? A. Yes, sir.

"Q. And your memory is, that this is also your recollection, from the facts as you have already testified, and from the fact that you made this memoranda at the time? A. Yes, sir."

These questions were objected to by defendant upon the ground that "no sufficient foundation had been laid and as hearsay."

We think the witness only referred to the entry to refresh her memory. Neither the Bible nor the entry was offered or received in evidence. No objection was made as to the time of the entry, nor that it was not in the handwriting of the witness.

A witness may refresh his memory by a written entry or memorandum made at the time, and it is not necessary that the writing itself be admissible in evidence. (1 Greeleaf on Evidence, sec. 436; *People v. Le Roy*, 65 Cal. 613.)

The case of *People v. Mayne*, 118 Cal. 517,¹ is not in conflict with the views herein expressed. In that case the Bible was admitted in evidence under defendant's objection. It is said in the opinion: "It was not competent for the prosecution to introduce as a piece of substantive evidence in support of this issue her written declaration made several years previously."

For the reasons above stated it was not error to allow Dr. Gray to refresh his memory as to the date of the birth of the girl by an entry in his cash-book August 2, 1884. He stated that he attended the mother at the birth of the child, and that he made the entry at the time in his cash-book, and that by the entry he knew the date to be August 2, 1884.

3. The court, under defendant's objection, allowed evidence showing that defendant, in company with the prosecutrix, and another young girl of about seventeen and a young man in company with her, were in the parlor of the Farmers'

¹ 62 Am. St. Rep. 256.

Hotel in the town of Colusa on the day of, and about an hour before, the assault. That while there the four were engaged in drinking and did drink wine. That defendant went downstairs to the bar-room of the hotel and brought up the drinks to the party. Defendant's counsel contends that this was evidence tending to prove that defendant administered intoxicating narcotics with intent to prevent the prosecutrix from resisting, under subdivision 4 of section 261 of the Penal Code, and that he is not charged with any such acts. He puts the proposition in this form: "Where a defendant is charged with rape under subdivision 1 of section 261 of the Penal Code, is evidence that the crime of rape was committed by him under subdivisions 2, 3, 4, 5, and 6 admissible to prove the charge?"

The proposition has been squarely passed upon and answered in the affirmative by this court in *People v. Snyder*, 75 Cal. 324, where it is said: "We think the true construction of section 261 to be that thereby the legislature meant merely to put beyond doubt the rule that on an information for rape the things mentioned in the subdivisions could be proven, and would establish the crime. It is not intended to alter or establish a rule of pleading, or to create six different kinds of crime." Under the decision in the above case the evidence was properly admitted.

4. It is claimed that the conduct of the district attorney in making certain statements and repeating certain questions was error. We have examined all the matters alleged to be error in this regard, and find therein nothing which warrant us in reversing the case. One of the matters most strongly urged to be error is that when prosecutrix was called as a witness the district attorney asked the defendant to consent to an order of court that all bystanders be excluded from the courtroom. The defendant refused to give his consent, and the order was not made. The district attorney then said: "I will ask all bystanders, then, in the name of common decency, if they have daughters or sisters of their own, to absent themselves from the courtroom during the testimony of this little girl."

The defendant, without objecting to the statement or asking to strike out the request, saved an exception thereto. The

judge remarked: "It is improper for the district attorney to make this demand."

We do not think the request could have injured the defendant. It was not the statement of any fact not in evidence, nor was it any statement as to the character or motives of defendant. It does not appear to have been made through any passion or prejudice, or with intent to injure defendant. One Turman, who appears to have been one of the parties engaged in drinking in the parlor of the hotel, was near the hotel, and went upstairs just after the marshal and other parties went to the room of defendant.

The witness Anderson, who was with the marshal, testified that they met Turman ten or twelve feet from the room, and that Turman asked the witness what he thought about it. The following questions were then asked of the witness by the district attorney:

"Q. Did you see anything of Turman after he went down the back stairs of the Bond building?

"Q. Now, during the time that Scoggins went down after the keys and was gone, what did Turman do?"

The court sustained defendants objections to both these questions. The district attorney then said: "I will ask the court directly and take a square ruling on it. It seems to me it is a part of the *res gestae* and ought to be admitted."

The Court: "I will allow it." Defendant excepts. "Q. I will ask you whether or not it is true that Turman rushed down the back stairs, and commenced throwing up sticks against the window to notify this man to get out of there?"

The question was objected to by defendant as irrelevant and leading, and the objection sustained. The ruling of the court was evidently correct. We cannot perceive how the asking of the question by the district attorney could have injured defendant. If the question was asked for the purpose of having the jury believe that Turman did try to notify defendant to get out of the room, and if the jury did believe it, from the mere asking the question, it could not have injured defendant. The district attorney asked permission of the court to ask the question. No motion was made to strike it out. It does not appear that the district attorney was acting

in bad faith, or that he by insinuation endeavored to get facts before the jury that in his opinion he could not prove. The defendant appears to have been treated fairly by the district attorney. The court so carefully guarded his rights that few errors are seriously urged.

The judgment and order should be affirmed.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Temple, J., McFarland, J., Henshaw, J.

[Sac. No. 641. Department Two.—July 9, 1900.]

ALBERT H. STARR, Respondent, v. L. KREUZBERGER
et al., Appellants.

MASTER AND SERVANT—LIABILITY OF MASTER FOR DEFECTIVE APPLIANCES.—A master is liable to the servant for injury caused from defective or unsafe appliances, the defects and danger from which were unknown to the servant, and were not obvious to his view.

ID.—MEANS OF KNOWLEDGE—DUTY OF MASTER—RIGHTS OF SERVANT.—The mere fact that the master and servant may have had equal means of knowledge will not save the master from liability. The master is bound to use the means of knowledge, and has no right to assume that the servant will discover defects in appliances rendering them unsafe. The servant has no such duty, but has a right to rely upon the master's means of knowledge, and duty of inquiry. He is not required to use any degree of care or diligence to discover defects or danger not obvious, and in regard to which he is not put upon inquiry by any discovery or suggestion of danger which it would be gross carelessness for him to neglect.

ID.—UNSAFE BRICK WALL—INJURY TO SERVANT—OBEDIENCE TO ORDERS—DANGER NOT OBVIOUS.—Where an injury resulted to the plaintiff from the falling of an unsafe brick wall in front of which he was employed as a bricklayer in building a front wall under employers, one of whom directed the work, and the obeying of whose instructions caused the falling forward of the rear wall, which was not an obvious danger to the plaintiff of his obedience to orders, it was the duty of the employers to know the condition of the wall,

and the plaintiff was justified in obeying the orders given, and the employers are responsible for the resulting injury.

Id.—CONSISTENCY OF FINDINGS—IGNORANCE OF UNSAFE CONDITION—COMPARATIVE OPPORTUNITY OF KNOWLEDGE.—Findings that the plaintiff was ignorant of the unsafe condition of the wall, and that he did not have a better opportunity than the defendant for seeing and knowing its condition, are not contradictory.

APPEAL from a judgment of the Superior Court of Sacramento County. J. E. Prewett, Judge presiding.

The facts are stated in the opinion.

Holl & Dunn, for Appellants.

A. L. Shinn, A. P. Catlin, and Henry Starr, for Respondent.

CHIPMAN, C.—Action by an employee against his employers to recover damages for personal injury claimed to have been sustained through their negligence. The defendants claimed that the injury was the result of plaintiff's carelessness. The cause was tried by the court and plaintiff had judgment. Defendants move for a new trial, and the appeal is from the order denying the motion. Some objections are made to the findings as contradictory and argumentative, but the principal question argued is that the findings are not supported by the evidence.

The injury resulted from the falling of a brick wall on which plaintiff was working as a bricklayer. The findings challenged were: "Finding III. That said brick wall was in an unsafe condition for the work for which plaintiff was employed and directed to perform, and which defendants knew, but of which plaintiff was ignorant. That while working, and through and by the negligence of the defendants in employing plaintiff upon said work and directing him in the manner of performing the same, and without fault or negligence on the part of the plaintiff, the said wall fell upon and injured plaintiff," etc. "Finding IV. That plaintiff did not have a better opportunity than the defendants of seeing and knowing the condition of said wall. That plaintiff was not guilty of carelessness or negligence in working upon said wall."

Plaintiff was a journeyman bricklayer of thirty years' experience. Defendants were partners and contractors for the

work being done, Kreuzberger being an experienced brick-layer and contractor, and Harvie a carpenter and contractor. The work was being done on a small brick building, part of the premises of the City Brewery in Sacramento, attached to the east side of the main brewery building. It was a one-story brick structure, with a brick gable front. The improvement consisted in raising the building an additional story and adding to the thickness of the wall by building a new four-inch wall of pressed brick from the ground, upon and against the entire front. The roof was first detached from the walls of the building and raised to the required height and supported there free from the walls. The new wall was to be tied or fastened to the old wall by cutting out two courses of brick across the front every two feet and inserting therein what were called "headers," or courses of brick, crosswise of the main wall, so as to connect the main with the new wall, and thus tie them together. These grooves were cut continuously across both buildings, as both were undergoing similar changes. We have to deal, however, with the smaller building and shall refer only to it. The walls of this building were originally twelve or fourteen inches thick from the ground up to the bottom of the ceiling joists, a distance twelve or fourteen feet. From this point a fire-wall extended upward "several feet above the bottom of the ceiling joists," and was eight or nine inches thick, resting on the twelve-inch wall. Upon this fire-wall was the front gable-end, of the same thickness as the fire-wall. Successive grooves were cut, and no question is made that this could be done safely in the thirteen-inch wall, but the last groove was cut about two inches below where the eight-inch fire-wall rested on the thirteen-inch wall, which undermined the fire-wall or gable-end, and it fell upon and injured plaintiff while he was at work. Appellants say in their brief: "It is not denied that cutting this last groove, four and one-half inches deep into the thirteen-inch wall, two inches below the point where the nine-inch wall commenced, caused the nine-inch gable-wall to fall; and the whole question is whether the plaintiff is free from negligence in cutting this groove."

It is conceded by both parties that there was no danger in cutting the grooves in the thirteen-inch wall, and all of them had been cut by direction of Kreuzberger as continuous

grooves, i. e., from end to end, without leaving any sections of the bricks in the grooves. There is evidence that where there is danger from the upper portion of the wall giving way when undermined in this manner, the proper and safe course to pursue is to leave portions of the wall, at intervals, undisturbed, but in the thirteen-inch wall this, it is conceded, was not necessary, and no such precaution was taken. There were six workmen on the job and all were on the scaffold at the time the last groove was reached, and they had begun work on it when defendant Kreuzberger appeared.

Plaintiff testified that he was employed by defendant Kreuzberger and was working under his direction, as it appears were the other workmen also; at the time of the accident they were working on a scaffold nine or ten feet high, and they had carried up the four-inch wall about twelve feet; plaintiff was working at the east end of this wall or corner of the building, and on his left were the other workmen at intervals along the scaffold; the top of the brick wall at the corner was so high above the scaffold that plaintiff could not reach to the top. He testified: "I am not certain how high that thirteen-inch wall extended up. There was a fire-wall on the building. I did not know at that time how high the fire wall was. There was nothing on the front of the building, where I was working, to indicate where the fire-wall commenced. Standing upon that platform where I was at work I could look up and see that the fire-wall was an eight-inch wall at the top. . . . At the time we were cutting the slot, just before the wall fell, we had built up the four-inch wall to where the course of stone was put on, and that would stop our work until the stone masons had completed theirs. Mr. Kreuzberger came to me and said that he did not see how we were going to continue the work there; that the stone masons were in the way. But he says, 'You can cut a slot through there for the next header, and then you and Corsaw go up to the Buffalo Brewery.' I said, 'Where will I cut?' He turned to the wall and said, 'Well, about here,' putting his finger on the wall. I looked up and said, 'Aren't we getting pretty high?' And he said, 'No, that's all right.' Then Corsaw, standing inside of me, said: 'Well, what's the matter with cutting under the header?' That would bring it two

courses still lower than he first indicated. He said, 'All right, let it go at that, and have them all cut on the same line.' He left then and went toward Mr. Day's corner. . . . He came back and finally said, . . . 'Just cut that slot through, and you and Corsaw come up there, and the other boys will have to knock off.' He turned then and left again. We went to work and cut where he told us—that is, under the header." He then describes how the work proceeded, and how as the last brick was knocked out of the groove the wall fell over on them.

Plaintiff was given a very searching cross-examination as to what he meant when he said to Kreuzberger, "Aren't we getting pretty high?" the purpose being to show that plaintiff was fully warned of the danger and knew as well as his employer did the exact conditions under which he was working. He testified: "The reason I asked him that question was to be sure that we were not cutting too high in that twelve-inch wall, so as not to cut into the eight-inch wall and through that wall. In other words, I wanted to be sure that we were not cutting too high. Q. In other words, you suspected you might be up where you might be cutting into the eight-inch wall? A. No, sir; if I had had the least suspicion of it I would not have cut there." Plaintiff was further pressed upon this point, and testified: "Q. Now, if you wanted to be certain, you had not been certain before that, had you? There was a doubt in your mind? A. Well, we had not cut there. No, there was not a doubt after he had given me the order. . . . I asked the question to be certain, and that is about the only way I can explain that. I asked that question in order to be certain that we were all right."

Further cross-examination developed the fact that plaintiff had, two years before, worked on the building and helped to lay the gable wall. "From the fact, then, of seeing the wall, and from having constructed that wall, you knew exactly how it was constructed? A. At the time it was constructed, yes. Q. Knew as much about it as Mr. Kreuzberger did? A. No, sir; I don't think so. Because he was the boss there and looked after the work. He would look at it more particularly than I would."

He was asked what information Kreuzberger had that he, plaintiff, did not have, and answered: "Why, he was the contractor there. He had been up there and figured. He must have been up there and figured on the work that he was going to do." Witness Day, one of the bricklayers on the job, testified: "It could not be seen from the outside, where we were at work on the platform, where the eight-inch wall commenced. Mr. Kreuzberger came along the platform and pointed out the place to cut the groove. He indicated the course of bricks to be removed, and we cut out the course which he indicated. After the wall fell I examined it, and found that the wall broke off within one or two courses of brick from the point where the eight-inch wall joined the twelve-inch wall." Hansen and Lynch, two other bricklayers who assisted in the work, testified that the groove was cut where Kreuzberger directed, and that they could not tell from the platform where the eight-inch wall joined the twelve-inch wall. Corsaw, who worked next to plaintiff, testified that they could not tell from the scaffold where the eight-inch wall commenced. "We would have to get a ladder and get up on top of the wall and measure the wall on the inside from the top down to the thirteen-inch wall where the eight-inch wall commenced, to ascertain that fact."

The architect, Mayo, testified: "A day or two before the gable end of fire-wall fell I told Lucas Kreuzberger [defendant] that that wall must be taken down. He knew that it had to come down, for the contract and specifications required that eight-inch wall to be taken down." Jackson, a laborer on the work, testified that Kreuzberger was on the top of the wall several times; that he, witness, had been ordered by the architect to take the gable-wall down; "I was about to commence upon it when Mr. Kreuzberger came along and ordered me not to do it. I asked Mr. Kreuzberger who was boss of this work, and he said he was, but he must humor Mayo a little. He said he would save money by not taking the wall down." There is nothing in the evidence to warrant the inference that the architect ordered the wall taken down because of any fear that it might fall; the significance of this evidence lies in its tendency to prove that Kreuzberger knew all about the wall, and in tending to give rise to a further inference that in his endeavor to avoid taking the wall down

he was not as mindful of his servants' safety as it was his duty to be as a master, or as he otherwise would have been. The evidence is given with considerable fullness because of defendants' very earnest contention that the court drew erroneous deductions from it, and because it is seriously contended that under well-settled rules of law the evidence shows that plaintiff contributed to his injury by his own negligence and should not recover.

Appellants cite numerous cases, from which they deduce the following: "The doctrine established by these cases is that an employee engaged upon work that is dangerous, or using defective appliances or machinery, or working upon dangerous or insecure scaffolding, cannot recover damages for any injuries received through such defects, provided he knew, or had the means of knowing, the dangerous condition of such machinery or appliances; nor can he recover if his means of discovery of the defects and dangerous condition is as good as that of his employer." In the case of *Silveira v. Iversen*, 128 Cal. 187, reference was made to *Magee v. North Pac. Coast R. R.*, 78 Cal. 437,¹ where the rule relied upon by appellants that the servant cannot recover if his knowledge is as good as that of his master was held to be erroneous. In that case it was said: "The master has no right to assume the servant will use such means of knowledge, because it is not part of the duty of the servant to inquire into the sufficiency of these things. The servant has a right to rely upon the master's inquiry, because it is the master's duty so to inquire, and the servant may justly assume that all these things are fit and suitable for the use which he is directed to make of them. Mr. Justice Temple in the *Silveira* case said: "The employee is not required to use any degree of care or diligence to discover defects. He will be held to have assumed the risk only when he knew, and will be held to have known when the defect was so obvious that he must have known or simply refused to open his eyes and see, or when he was put upon inquiry by some discovery or suggestion of danger which it was gross carelessness for him to neglect."

It is strongly urged that because plaintiff helped to construct this wall two years before he must be held to have

¹ 12 Am. St. Rep. 69.

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known all about it. But he testified that he did not know where the eight-inch wall joined the thirteen-inch wall and this is the vital fact in the case. We must assume that defendants knew this fact and, if they did not know it, the duty was cast upon them to know it, and plaintiff had a right to assume that they did know it. The evidence is that this fact could not be discovered from any point where the men were working, and that to have ascertained the place of junction of the main wall and the fire or gable wall would have required the laborers to make an investigation apart from their duties, and which it was defendants' duty to make, and which plaintiff had a right to assume that defendants, as contractors, had made. When plaintiff remarked to Kreuzberger, "Aren't we getting pretty high?" he, no doubt, had in his mind that they were near the eight-inch wall, and perhaps too near to make it entirely safe to cut the groove where Kreuzberger indicated. But when he was assured by his employer that it was all right to go ahead where he pointed out, I think plaintiff was exonerated from making any independent investigation, and was justified in assuming that there was no danger and that his employer knew more about the condition of the wall than he did. The danger was not obvious; it depended upon a fact which plaintiff did not know and which it was his employer's duty to know, and we think plaintiff was justified in going forward in obedience to the directions given him. (See 1 Bailey on Personal Injuries, secs. 898 et seq., where the question is discussed and the cases pro and con are collected.)

We do not think the findings are amenable to the objection that they are contradictory and argumentative. The alleged argumentative feature is in respect of allegations found in the answer which the finding negatives. One finding states that plaintiff was ignorant of the unsafe condition of the wall; and another finding states that he did not have a better opportunity than defendants for seeing and knowing its condition. Defendants' point is that because the finding was that plaintiff had no better opportunity, it in effect found that he had "as good an opportunity as defendants of seeing and knowing" the danger. We fail to see any necessary contradiction in the findings.

It is advised that the order be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed. McFarland, J., Temple, J., Henshaw, J.

[Sac. No. 679. Department Two.—July 9, 1900.]

H. C. HORSMAN et al., Respondents, v. PARIS ALLEN et al., Appellants.

TRUST—RELIGIOUS ASSOCIATION—UNITED BRETHREN—MAJORITY AND MINORITY SCHISM.—A conveyance to trustees named therein and their successors in office “in trust for the United Brethren in Christ for camp-ground, meeting-house, and parsonage purposes,” is for the benefit of what is known as the “liberal” church, constituting a majority of that order, and not of the minority known as the “radical” church of the same order.

ID.—SECEDING MINORITY OF GENERAL CONFERENCE.—A small minority seceding from the general conference of a religious body, which is the highest legislative and judicial body in the church, must be regarded as abandoning the church, if there is no such revolutionary usurpation of power in the governing body as to result in a new and substantially different organization, or in such a radical change of the articles of faith as to constitute an essentially different religion from that previously followed by the church.

ID.—ACTION OF GENERAL CONFERENCE—CHANGE IN ORDINANCE OF CHURCH—REVISION OF ARTICLES OF FAITH.—The general conference of the church, as the highest legislative body therein, cannot bind future conferences by adopting a so-called “constitution” which is in its nature a legislative ordinance, and not a constitution to be adopted by the members of the church; and a change in such “constitution,” together with a revision of the “articles of faith” by a subsequent general conference not touching the identity of the organization, or of the general faith of the church, is valid and binding as an ordinance of the church, if not as a constitution.

APPEAL from an order of the Superior Court of Tulare County denying a new trial. Wheaton A. Gray, Judge.

The facts are stated in the opinion.

E. T. Cosper, for Appellants.

The liberal church is the true church of the United Brethren in Christ. (*Itter v. Howe*, 23 Ont. App. 236; *Rike v. Floyd*, 6 Ohio C. C. 80; 53 Ohio St. 653; *Schlichter v. Keiter*, 156 Pa. St. 119, 146, 147; *Philomath College v. Wyatt*, 27 Or. 473, 475; *Kuns v. Robertson*, 154 Ill. 394, 415, 416; *Russie v. Brazzell*, 128 Mo. 93.¹) It is not the province of temporal courts to assume ecclesiastical jurisdiction and the decisions of the ecclesiastical body itself are to be taken as final and conclusive. (1 High on Injunctions, secs. 310, 314, and cases cited *supra*; *Auracher v. Yerger*, 90 Iowa, 566; *Wheelock v. First Pres. Church of Los Angeles*, 119 Cal. 482; *Russie v. Brazzell*, *supra*; *Watson v. Jones*, 13 Wall. 679-733; *Earle v. Wood*, 8 Cush. 467; *Krecker v. Shirey*, 163 Pa. St. 534-58; *Lamb v. Cain*, 129 Ind. 512, 518; *Pounder v. Ash*, 44 Neb. 672; *Connitt v. Reformed Prot. Dutch Church etc.*, 54 N. Y. 551-61; *East Norway Lake Church v. Halvorson*, 42 Minn. 503.) A legislative body cannot bind its own future action by a mere law or ordinance. (*Bloomer v. Stolley*, 5 McLean, 158; *Richardson v. Union Cong. Soc.*, 58 N. H. 187; *Smith v. Nelson*, 18 Vt. 512; *Mongeon v. People*, 55 N. Y. 613.) There was no radical change of faith or perversion of the trust by the revision. (*Lamb v. Cain*, *supra*; *Itter v. Howe*, *supra*; *Brundage v. Deardorf*, 92 Fed. Rep. 214.) Seceding members forfeit their right to the church property. (*Wiswell v. First Congregational Church*, 14 Ohio St. 32; *Methodist E. Church v. Wood*, 5 Ohio, 283; *McGinnis v. Watson*, 41 Pa. St. 8; *Den v. Bolton*, 12 N. J. L. 206; *Associate etc. Church v. Theological Seminary*, 4 N. J. Eq. 77.)

Davis & Allen, for Respondents.

The question is one of identity of the church of the United Brethren in Christ. (*Brundage v. Deardorf*, 55 Fed. Rep. 839, 846; *Bear v. Heasley*, 98 Mich. 279; *Schnorr's Appeal*, 67 Pa. St. 146²; *Philomath College v. Wyatt*, 27 Or. 390, dissenting opinion of Wolverton, J.; *Watson v. Jones*, 13 Wall. 679.) The revision essentially changed the articles of faith, and the radical church alone represents the original faith. (*Brundage v. Deardorf*, *supra*; *Bear v. Heasley*, *supra*.) Questions of creed and church government may be

¹ 49 Am. St. Rep. 542.

² 5 Am. Rep. 415.

determined by the court, when property rights are affected thereby. (*Smith v. Nelson*, 18 Vt. 511; *Watson v. Avery*, 2 Bush, 332; *Watson v. Garvin*, 54 Mo. 353; *Gartin v. Penick*, 5 Bush, 110.) The old constitution and confession of faith were as much parts of the trust deed as if written therein. (*Hale v. Everitt*, 53 N. H. 11, 70³; *Watson v. Jones*, 13 Wall. 683, 720; *Miller v. Gable*, 2 Denio, 548.) The trustees are perverting the trust by allowing the defendants to occupy, and equity will give relief in such case. (*Harrison v. Rowan*, 4 Wash. C. C. 202, 206; *Barclay v. Howell*, 6 Pet. 498, 507; *Watson v. Jones*, *supra*; 1 Beach's Modern Equity Practice, sec. 70.)

SMITH, C.—The controversy in this action grows out of a schism in the Church of the United Brethren in Christ, occurring at the general conference of the church at York, Pennsylvania, in the year 1889.

The Church of the United Brethren originated in a voluntary association of Protestants of various denominations at some period during the eighteenth century; and its original creed was simply that of the orthodox Protestant churches generally, but allowing divergencies in matters wherein they differed. It received its first organization from a conference of its ministers held at Baltimore, Maryland, in the year 1789. Its first general conference was held at Mt. Pleasant, Pennsylvania, in 1815; at which time a form of discipline and a confession of faith were adopted. Up to this time the church was without any form discipline or confession of faith, nor until the year 1841 did it have any constitution.

In that year an instrument known as the "constitution" of 1841 was adopted by the general conference. It is distinguished from other ordinances of the general assembly only in the name given to it, and in the nature of its contents. Its preamble reads: "We, the members of the Church of the United Brethren in Christ. . . . ordain the following articles of constitution." This would seem to indicate that a submission of the constitution to the members of the church for adoption was contemplated, but in fact it was not so submitted. It contained, among other provisions, the following:

1. No rule or ordinance shall at any time be passed to change or do away with the confession of faith as it now stands; 2. There shall be no connection with secret combinations; 3. There shall be no alteration of the constitution unless by request of two-thirds of the whole society.

At the general conference of 1889 a new constitution and a revised confession of faith were adopted by a vote of one hundred and ten to twenty. Thereupon the minority assembled in another part of the city, and undertook to carry on the session of the conference—claiming that it had exceeded its powers, and that the other delegates, by their illegal action in adopting and adhering to the amended constitution and revised confession, had abandoned the Church of the United Brethren in Christ and organized another and distinct church. Both organizations continued to use the old name; and their respective adherents have come to be called—those of the majority organization, “liberals”—those of the minority, “radicals.” Since then the schism has become general throughout the United States. In the Tulare circuit (the *locus* of the matters involved in this suit) most of the members (seventy-five out of eighty) have gone with the radical division of the church.

The immediate purpose of this action is to determine the respective rights of the parties to the use and control of two tracts of land situate in the county of Tulare, conveyed, in the years 1878 and 1879, to G. D. Wood et al., “trustees, and their successors in office, in trust for the United Brethren in Christ for camp-ground, meeting-house and parsonage purposes.”

The plaintiffs are the trustees elected by the quarterly conference of the radical church for the management of the church property; the defendants occupy a similar position with regard to the liberal church, and are in the occupation of the property in controversy.

It is alleged and found that the legal title to the lands in question is in the plaintiff. But the action of the quarterly conference could not operate to transfer to title of the original trustees to the new trustees appointed by it. (*Blakeslee v. Hall, etc.*, 94 Cal. 159; *Waterman on Corporations*, 28, 29, 31.) The title to the land is therefore still vested in the trustees named in the deeds, or such of them as survive. The

error is, however, immaterial for the purpose of this case. The legal title is held upon the trusts named in the deed. Under these the officers and members of the local church have the right to use and occupy the lands in accordance with the regulations of the church; and these rights may be vindicated, in an appropriate action, by any of them suing for themselves and the others. (*Baker v. Ducker*, 79 Cal. 372; *Watson v. Jones*, 13 Wall. 720.) Hence, the plaintiffs, if they represent the true Church of the United Brethren in Christ, have the right to occupy and control the lands in question, and, if hindered in the exercise of the right, may maintain the action. The sole question, therefore, is as to the identity of the church. If the radical is the true church, the plaintiffs are entitled to recover; otherwise not.

This question has been involved in numerous cases—some resulting in favor of the radical, some in favor of the liberal organization. Of the former kind are the cases of *Brundage v. Deardorf*, 55 Fed. Rep. 839, and *Bear v. Heasley*, 98 Mich. 279; of the latter, *Schlichter v. Keiter*, 156 Pa. St. 119; *Kuns v. Robertson*, 154 Ill. 394; *Lamb v. Kane*, 120 Ind. 486; *Russie v. Brazzell*, 128 Mo. 934; *Itter v. Howe*, 23 Ont. App. 236; *Rike v. Floyd*, 6 Ohio C. C. 80, 53 Ohio St. 653; *Philomath College v. Wyatt*, 27 Or. 390. We agree in the conclusion and generally with the reasoning of the latter cases.

There is, it must be admitted, a very strong *prima facie* case against the plaintiffs. The radical division of the church—represented by them—had its origin in the secession of a small minority from the general conference—"the highest legislative and judicial body . . . in the church." In such a case the seceding body must, in general, be regarded as abandoning the church; nor is there any exception to this rule unless in the case of a usurpation of power in the governing body so revolutionary in its character as to result either in the creation of a new and essentially different organization, or in such a radical change of the articles of faith as to constitute an essentially different religion from that previously followed by the church. (*Watson v. Jones, supra.*)

These and other principles involved in the case are elaborately and profoundly discussed by Judge Miller in the case cited. The courts are in no way concerned with the transactions of ecclesiastical bodies except in so far as tangible rights of person or property are affected. Questions relating to these are divided by the court into three classes: The first is where property, by the express terms of the grant, "is devoted to the teaching, support, or spread of some specific form of religious doctrine or belief"; the second, where it is held by or in trust for an independent congregation; and the third, where it is held by or in trust for a congregation or other association subordinate to some general church organization. The case, it will be observed, belongs to the last of these categories; and the decisions bearing on the first have no application. In cases of this class the trust can be affected only by a change of political organization, or of religious creed of the kind we have described—that is to say, so radical in nature as to effect the identity of the original organization, or of the original faith. Accordingly, the plaintiffs' case rests upon the alleged existence of these grounds; and the justice of this contention is the question to be determined.

The specific claim made is that the act of the general conference in the premises was in violation of the three provisions of the constitution of 1841, cited above, and therefore *ultra vires*. The position of the plaintiffs, therefore, seems to rest upon three grounds, namely: 1. Failing to observe the requirements of the old constitution relating to its amendment; 2. The repeal of the article as to secret societies; and 3. The revision of the confession of faith. But the second and the third of these grounds are involved in the first, in so far that a decision against the plaintiffs on that must be conclusive also as to the other grounds. For if the adoption of a new constitution was otherwise within the powers of the general conference, those powers must have extended also to the adoption of the specific provisions complained of. For it cannot be fairly contended that the abrogation of the provision as to secret societies, or the changes made in the confession of faith, were of a character to touch the identity, either of the organization or of the faith of the church. Indeed, it is clear from the record that the contention of the plaintiffs with

reference to these changes is based upon the supposed fact that they were forbidden by the constitution of 1841; and certainly, but for the provisions of that instrument, no objection could be reasonably urged against them. It follows, if it be assumed that the change of the constitution was otherwise within the powers of the general conference, that these objections fall to the ground; they become material only on the contrary assumption. The case may therefore be considered under two aspects, namely: 1. Upon the assumption that the action of the general conference in adopting the new constitution was in violation of the provision of the constitution of 1841 as to amendments, and therefore *ultra vires*; and 2. As involving the question of the validity of the action of the conference in this regard. Under either aspect we are of the opinion that the merits of the case are with the appellants, but, in view of the importance of the questions involved, both aspects of the case will be considered.

1. The case was considered under the former aspect in *Bear v. Heasley, supra*. In that case the judges agreed in holding that the general conference, in adopting the new constitution, failed to observe the requirements of the constitution of 1841, and that its act was therefore void. The majority of the court held that by this action the general conference, and those members of the church who adhered to it, put themselves outside the pale of the church, which thereafter consisted of the minority organization. But we regard the reasoning of the dissenting judge (Grant, J.) as the most satisfactory, and will adopt it: "Grant that the action of the conference was illegal in declaring the amendments adopted, it is indeed a startling proposition that by this act the conference destroyed its identity, ceased to represent the church, seceded from it, and thereby became a new and different church. The proposition finds no principle in law, equity, or good sense upon which to stand. The fifteen who left the regularly constituted conference became the seceders, and not those who remained in it. . . . The minority in this case have mistaken their remedy. They should have pursued a legal and orderly course, which was clearly open to them. They should have protested, and, failing in this, have applied to the proper courts to determine the

validity of the proceedings to adopt the amended constitution, and, if such courts found them void, they would hold the old constitution in force, and compel the officers of the church to recognize and act under it. This proposition seems to me so clear that I deem further argument unnecessary."

In reaching this conclusion the judge seems to have had in view the changes attempted in the political organization of the church only, and not the effect of the changes in the confession of faith on the creed of the church—a subject already considered by him. For this, perhaps, the courts could not furnish a remedy, or, at least, a complete remedy. Hence could it be held that the revision of the confession of faith constituted an essential change of the faith of the church, the contention of the plaintiffs might be sustained. But questions of this kind are, in general, of purely ecclesiastical jurisdiction; and it is only in very extreme cases—of which this is not one—that the ordinary courts can pass on them. We must, therefore, regard the decision of the general conference—"the highest legislative and judicial body . . . in the church"—as conclusive upon the question here involved.

In this we agree with Judge Grant in the opinion cited, where the question and the principle governing its decision is thus stated: "It is contended . . . that the revised confession of faith is a radical change from the old, and that by its adoption the faith and doctrine upon which the church was founded have been subverted and overthrown. . . . If this contention be sustained it follows that the minority are entitled to the possession of the church property. [But] it is the settled law of this country that the judgments of the judicial tribunals of the church organizations upon matters of faith, discipline, and the general polity and tenets of the church are binding upon the civil courts. . . . There can be no exception to the rule, except in a case where even in the minds of laymen no doubt can exist, and it is clear, beyond controversy, that the fundamental principles of the church have been destroyed by the one party and been adhered to by the other."

Numerous authorities are cited to the above proposition, and, among others, *Watson v. Jones, supra*, which may be regarded as the leading case, and as such conclusive, upon

the question. Any other rule would be destructive to the liberty which, by the laws of this country, is accorded to religious societies.

2. With regard to the validity of the constitutional amendment, if it was held in *Brundage v. Deardorf*, *supra*, that the action of the general conference in adopting the new constitution was *ultra vires*, and therefore void; and from this—without discussing the question as to the effect of a void amendment of the constitution on the identity of the church—the conclusion was reached that the defendants (representing the radical branch of the church) were entitled to the property in question. The specific point on which the actual decision was rested was that, in the submission of the constitution to the vote of the members, sufficient notice of the submission, and of the day of election, was not given to the entire membership. But the case—being under the Ohio law—must be regarded as in effect overruled by the subsequent decision in *Rike v. Floyd*, 53 Ohio St. 653. In the case last cited, and in other decisions cited *supra*, it was held that the proceedings for the submission of the new constitution to the members of the church constituted a substantial fulfillment of the requirements of the constitution of 1841.

We think, however, while concurring in this view, that the conclusion reached may be placed upon grounds perhaps more satisfactory. The constitution of 1841 was itself but an act or ordinance of the general conference, adopted by it over half a century after the original organization of the church. Nor is there anything in the instrument to differentiate it from other ordinances, except the name and the expression of the will of the general assembly that it should not be amended unless as therein provided. But it is a fundamental principle of the law that a legislative body cannot derogate from the powers of its successors, and that the latest act must always control. The maxim is, *Leges posteriores priores contrarias abrogant* (1 Rep. 25 b, cited Broom's Legal Maxims, 28); and it is difficult to perceive how the application of this maxim can be escaped.

The term "constitution" is used in several senses. In a broad sense of the term we may speak of a constitution resting upon usage, or acquiescence—as in England. But in this country, when we use the term, we refer exclusively to the

sovereign acts of the people, acting by conventions or in other constitutional modes. (Cooley's Constitutional Limitations, 5, 6.) Such constitutions can neither be made, abrogated, or amended otherwise than by written acts of the people generally. The same power that made is competent, and is alone competent, to unmake or alter. Where the power of enacting constitutional laws is vested in the ordinary legislature the same principle applies, but its operation is different. The same body that enacts may repeal or amend. Hence, in England it is an admitted principle that the power of parliament is unlimited in this respect. (Cooley's Constitutional Limitations, 5, 6.)

It cannot be affirmed that the power of making constitutional enactments, otherwise than as implied in the general legislative power, was vested in the general conference of the church; but certainly whatever power was vested in the conference of 1841 was vested in that of 1889; and if this can be assumed to be the power of making constitutional laws, then it follows not only that the former conference could not derogate from the powers of the latter, but that the powers of neither could be impaired by usage or the acquiescence of the church. In England the power of changing the constitution, whether resting upon previous statutes or upon usage, is admittedly in the parliament; and the same principle applies here to the general conference, which is found to be "the highest legislative body . . . in the church." Obviously, therefore, if we use the term in the American sense, the notion of a constitution adopted by acquiescence is unknown to American constitutional law.

The record, however, does not sustain the proposition that the supposed constitution was acquiesced in as such by the church. The acquiescence was not universal, and there was always a difference of views on the subject. The act of 1841, it is true, was generally obeyed, and to that extent there was an acquiescence. But being the act of the highest legislative body in the church, it was binding on all, and all officers, official bodies, and members of the church were compelled, in this sense, to acquiesce in it.

We must, therefore, regard the action of the general conference of 1889 in adopting a new constitution as valid and binding on the church, if not as a constitution, at least as an ordinance of the church.

We advise, therefore, that the order denying a new trial be reversed and the cause remanded for further proceedings.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the order denying a new trial is reversed and the cause remanded for further proceedings.

Temple, J., McFarland, J., Henshaw, J.

Hearing in Bank denied.

[L. A. No. 716. Department Two.—July 9, 1900.]

CHARLES K. HUDSON, Respondent, v. ANNIE S. HUDSON, Appellant.

DIVORCE—EXTREME CRUELTY—PLEADING—DEMURRER—MOTION FOR JUDGMENT.—In action for divorce where the complaint states sufficient acts of cruelty to constitute the statutory offense of extreme cruelty, a general demurrer thereto and a motion of defendant for judgment on the pleadings are properly overruled.

ID.—TRIAL BY JURY—DISCRETION—REQUIRING OF DEPOSIT BY WIFE.—It is discretionary with the court to allow or refuse a jury trial of certain issues in an action for divorce; and where it is demanded by the wife, without the consent of the husband, to try issues of adultery, charged by the wife, the court has discretion to require the wife to deposit with the clerk one day's per diem and mileage of the jury, as a condition of making the order.

ID.—MOTION FOR NONSUIT—INTERPOLATION IN RECORD.—Where it appears that a motion for a nonsuit was properly denied, a statement interpolated in the bill of exceptions by the judge, that the evidence for the plaintiff was sufficient to meet all the allegations of the bill of complaint, does not injure the defendant, and will be disregarded as an attempt to forestall the question to be examined upon the evidence brought up.

ID.—HARMLESS ERROR.—Erroneous rulings upon evidence, which appear from the record not to have materially injured the appellant, are not ground for reversal.

ID.—ORDERS RELATING TO BILL OF EXCEPTIONS—APPEAL—REMEDY.—An appeal does not lie from an order refusing to amend a bill of exceptions, nor from an order refusing to strike out evidence there-

from, nor from an order refusing to settle a proposed bill of exceptions. The remedy for wrongful refusal to settle a bill of exceptions is by *mandamus*, and for wrongful refusal to allow an exception in accordance with the facts is by petition to this court.

APPEAL from a judgment of the Superior Court of San Diego County. E. S. Torrance, Judge.

The facts are stated in the opinion.

A. M. McConoughey, for Appellant.

McNealy & Andrews, for Respondent.

CHIPMAN, C.—Divorce on the ground of extreme cruelty. Plaintiff had judgment, from which defendant appeals. She also appeals from sundry orders hereinafter referred to. There is no brief for respondent. The record is in a very unsatisfactory condition, and it has been with much difficulty that we have been able to unravel its perplexities and ascertain just what alleged errors are properly before us. The record is attempted to be brought here by bill of exceptions; we will endeavor to follow appellant's points as made in her brief.

1. The demurrer on the ground of want of sufficient facts was properly overruled; the complaint alleged numerous and grievous acts of cruelty quite sufficient to constitute the statutory offense. The motion of defendant for judgment on the pleadings was properly overruled.

2. At the demand of defendant, and against the objection of plaintiff, certain issues of fact were tried by a jury, and the verdict was against defendant. It was not an abuse of discretion for the court to require defendant to deposit with the clerk one day's per diem and mileage of the jury, as a condition for making the order. It was within the discretion of the court to refuse a jury on any or all the issues; and it was equally within its discretion to impose reasonable terms in case it granted the jury at the request of one of the parties against the wish of the other.

3. The bill of exceptions, as certified, states that defendant moved for a nonsuit upon the ground of insufficiency of the evidence to entitle plaintiff to the relief demanded. The rec-

ord states as follows: "Said motion for a nonsuit was made after evidence had been given and received in behalf of the plaintiff, *which evidence was sufficient to prove all the allegations of the bill of complaint*, and after defendant had introduced all of her evidence in support of her charges of adultery on the part of plaintiff, and after the jury had found and returned into court their verdict that plaintiff was not guilty of adultery with any person named in said amended answer." It was not error for the court to deny the motion. Appellant claims that the clause noted above in italics was interpolated by the judge, and was error. There is nothing in the certified bill of exceptions to show how the clause came to be inserted or that it was objected to. In a proposed amended bill of exceptions, which the court refused to allow, it appears that this clause was inserted at plaintiff's request and against defendant's objection. Assuming, however, that the judge should not have allowed this clause to be inserted, we cannot see that it injures defendant, for this court will disregard it as an attempt to forestall the very question which is to be examined on the evidence brought up.

4. The findings were filed and decree was entered December 7, 1898. The only bill of exceptions that was settled and signed by the court was filed February 17, 1899, and recites: "This cause coming on to be heard, the foregoing evidence was introduced and the foregoing proceedings were had. Whereas defendant desires that the same be made a part of the record herein, I do hereby certify," etc. The bill recites the overruling of defendant's demurrer; her motion for judgment on the pleadings; her demand for a jury trial and her motion for nonsuit and some other matters not material to be noticed. Then follow some questions to witnesses and answers by them, of which the bill says: "No other evidence pertinent to defendant's objections was introduced at said trial." We have examined these questions, some of which were objected to by plaintiff and his objection sustained. While in one or two instances the objections, in our opinion, were not well taken, it is apparent that defendant did not suffer material injury by the rulings of the court.

5. The bill of exceptions just considered was not satisfactory to defendant, and after it was submitted as defendant's

proposed bill and before the court had finally acted upon it, defendant's attorney served upon plaintiff's counsel certain proposed amendments to the bill, which, with plaintiff's proposed amendments thereof, were delivered to the clerk to be presented to the judge for settlement, and defendant's attorney moved the court to allow said amendments. These proposed amendments, in addition to proposing much of the evidence that had been omitted from the first draft, then before the court, sought to amend the bill by adding thereto defendant's notice of intention to move for a new trial, which seems to have been omitted from the first proposed bill. The motion was supported by the affidavit of defendants' attorney, in which he stated that he is the sole counsel of defendant, and "as such prepared the proposed bill of exceptions, intending to incorporate the matter proposed to be incorporated by the above-described amendment. That said amendment is the only manner in which defendant can assign and show the errors complained of in said notice of intention. That said matter proposed as said amendment was accidentally omitted in said proposed bill of exceptions. That said notice of intention to move for a new trial avers as ground therefor that said findings and decision of the court are against the evidence and are not supported by the evidence." On February 11, 1899, the court denied defendant's motion, and thereupon, February 17, 1899, settled and certified the bill already noticed.

Defendant appeals: 1. From the order refusing to amend her bill of exceptions; 2. From the order striking out therefrom certain evidence and leaving therein certain evidence; 3. From the order refusing to settle her proposed bill of exceptions, which latter order was made March 3, 1899. These several orders were in fact refusals to amend the bill of exceptions first proposed which was settled and certified by the court. The order of March 3d, purporting to refuse to settle defendant's proposed bill of exceptions, was in fact a refusal to settle certain amendments proposed to the bill which was then under submission, and which was settled February 17th. But if this last order be regarded as a refusal to settle any bill of exceptions appellant cannot have relief by this appeal.

Section 652 of the Code of Civil Procedure does not apply where a trial judge has refused to settle any statement or bill of exceptions. The remedy for such refusal, if wrongful, is by *mandamus*. (*Landers v. Landers*, 82 Cal. 480.) Where the trial judge in settling a bill refuses to allow one or more exceptions which, in accordance with the facts, ought to be allowed, the remedy is by petition to this court. (Code Civ. Proc., sec. 652; *Landers v. Landers*, *supra*; *Hyde v. Boyle*, 86 Cal. 352; 89 Cal. 590; *In re Gates*, 90 Cal. 257; *Tibbets v. Riverside Banking Co.*, 97 Cal. 258.)

As there is nowhere in the record any notice of intention to move for a new trial, except in the proposed amendments to defendant's bill of exceptions which were refused, the appeal strictly is here on the judgment-roll alone. Under the circumstances, however, we have looked into the bill of exceptions as certified. Discovering no error therein, and ascertaining that the judgment is sustained by the findings, we advise that the judgment and orders appealed from be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[Sac. No. 674. Department One.—July 10, 1900.]

WILLIAM BREE, Appellant, v. LEWIS WHEELER, Respondent.

WATER RIGHTS—ADVERSE USER—INTERRUPTION.—An adverse user of the waters of a stream, in order to ripen into a title, must have been continuous and uninterrupted; and any interruption of the adverse user, however slight, prevents the acquisition of a prescriptive title.

ID.—INSUFFICIENT FINDING—ADVERSE USER OF HALF OF STREAM.—A finding of an adverse user of one-half of the stream in controversy, which shows that the user had been interrupted by the plaintiff at least once each year, by acts found to be acts of trespass, and which does not show that the defendant's user was open or

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notorious, is insufficient to support a judgment awarding one-half of the water to the defendant.

ID.—AGREEMENT FOR DIVISION OF STREAM NOT PLEADED—NEW TRIAL—AMENDMENT OF ANSWER.—Where the defendant testified to an agreement between plaintiff and defendant for division of the stream, which was not pleaded nor found, he will be allowed leave to amend the answer upon a new trial granted upon appeal.

ID.—COMPLAINT—DEFECTIVE ALLEGATIONS—APPROPRIATIONS—ADVERSE USER—AMENDMENT.—A complaint not specifically alleging that the plaintiff is the owner of the stream in controversy, and which attempts to allege an appropriation by plaintiff's grantor, without pleading the acts of such appropriation, and which alleges an adverse user by the plaintiff interrupted by the defendant, will be allowed to be amended upon a new trial granted upon plaintiff's appeal.

APPEAL from a judgment of the Superior Court of Nevada County and from an order denying a new trial. F. T. Nilon, Judge.

The facts are stated in the opinion.

Charles W. Kitts, for Appellant.

J. M. Walling, for Respondent.

COOPER, C.—Suit to determine the right to the water running in a stream known as "Rattlesnake creek." Judgment awarding one-half the water to plaintiff and one-half to defendant. Plaintiff made a motion for a new trial, which was denied, and he appeals from the judgment and order denying his motion. Defendant in his answer claimed and set forth that he had been in the adverse possession and use of all the waters of said stream for more than five years prior to the commencement of the action. The court found: "That the defendant has constantly, under a claim of right adverse to the plaintiff, used one-half of the waters of said stream at the point of his diversion, under an adverse claim of right against the plaintiff, ever since the year 1887. . . . That the use of said water by the defendant has been every year, at least, once interrupted, by turning it out of the head of defendant's ditch by the plaintiff, but the court finds such acts by the plaintiff to have been mere trespasses."

Upon this finding alone the court, as a conclusion of law, found defendant to be the owner of one-half the water of the creek. The finding does not show all the facts essential to establish title in defendant by adverse user. The user, in order to ripen into a title, must have been continuous and uninterrupted. (*Washburn on Easements and Servitudes*, 4th ed., 172; *Angell on Watercourses*, sec. 214; *Alta Land etc. Co. v. Hancock*, 85 Cal. 226.¹)

Interruption of adverse user, however slight, prevents acquisition of title by prescription. (*American Co. v. Bradford*, 27 Cal. 368; *Cave v. Crafts*, 53 Cal. 138; *Ball v. Kehl*, 95 Cal. 613.)

The possession must have been open and notorious, and not clandestine. (*Alta Land etc. Co. v. Hancock*, *supra*; *Unger v. Mooney*, 63 Cal. 595²; *Angell on Watercourses*, sec. 215.)

Here the court fails to find that the use by defendant has been continuous and uninterrupted, but finds affirmatively that it has been interrupted at least once a year. It may have been interrupted many times during each year, and the finding be true. The court adds that the interruptions were "mere trespasses." If the water was the property of plaintiff, he had the right to turn it out of defendant's ditch, and he would not commit a trespass in so doing. A man can do as he pleases with his own property without committing a trespass. The finding does not show how long these interruptions continued, nor whether they were as continuous as the use by defendant. Neither does the finding show that the use by defendant has been open or notorious.

As the case must be remanded for a new trial, it is proper to observe that the complaint does not allege that the plaintiff is the owner of the water of said creek. There is an attempt to allege an appropriation by one Sheets, the grantor of plaintiff, but the acts showing an appropriation are not pleaded; the complaint also attempts to allege title in plaintiff by adverse possession, but contains the allegation that the defendant has from time to time interrupted the use of the water.

It is claimed in defendant's brief and the evidence tends to

¹20 Am. St. Rep. 217.

²49 Am. Rep. 100.

show an agreement in the year 1885 between plaintiff and defendant, by which each was to take one-half the water. The answer contains no allegation as to any such agreement, nor is there any finding thereon.

The judgment and order should be reversed and the cause remanded, with directions to the lower court to allow the parties to amend their pleadings within a reasonable time if so advised.

Chipman, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded, with directions to the lower court to allow the parties to amend their pleadings within a reasonable time.

Van Dyke, J., Harrison, J., McFarland, J.

[S. F. No. 2076. Department Two.—July 10, 1900.]

HUGO HUGER TOLAND et al., Respondents, v. MARY J. EARL et al., Appellants.

ESTATES OF DECEASED PERSONS—SETTLEMENT AND DISTRIBUTION—EXCLUSIVE PROBATE JURISDICTION OF SUPERIOR COURT.—The superior court which has charge of the administration of the estate of a deceased person has exclusive jurisdiction as a court of probate over all questions relating to the settlement and distribution of the estate.

ID.—DERAIGNMENT OF TITLE TO ESTATE—DECREE OF DISTRIBUTION.—Under our probate system all deraignment of title to the property of deceased persons, whether dying testate or intestate, is through the decree of distribution entered as the final act in the administration of the estate.

ID.—CONCLUSIVENESS OF DECREE.—The law of an estate distributed under a will is the decree of distribution and not the will, and the decree of distribution is conclusive upon the whole world.

ID.—INSTRUCTION BY COURT OF EQUITY.—The superior court, sitting as a court of equity, has no jurisdiction of an action brought pending the administration of an estate to instruct the court having probate jurisdiction thereof, as to what distribution of the estate should be made under the will, after the administration has been completed.

ID.—ACTION IN EQUITY TO CONSTRUER WILL—LEGAL QUESTIONS—TRUSTS
—PROVINCE OF SUPERIOR COURT SETTling ESTATE.—An independent action in equity does not lie in this state to construe a will, whether it involves merely legal questions, or questions relating to the execution of trusts created by the will. It is the province of the superior court which settles the estate of a deceased person to construe the will and the trusts created thereby; and it may exercise all equity powers necessary for a complete administration of the estate, though not authorized in the limited exercise of its probate jurisdiction to determine controversies not within the scope of such administration.

ID.—EQUITABLE ACTION IN SAME COURT HAVING PROBATE JURISDICTION
—DISMISSAL—VOID JUDGMENT.—An action in equity brought in the same court which has probate jurisdiction over the estate, to obtain from that court sitting in equity a construction of the will for the same court sitting in probate, cannot be entertained, and must be dismissed. Any judgment rendered therein would be void.

ID.—CASES DISTINGUISHED—CHANGE OF CONSTITUTION.—Cases for the construction of wills and of trusts thereunder arising under the former constitution, which vested all equity jurisdiction in the district courts, and established separate probate courts, are inapplicable to the present judicial system established under the new constitution, which vests both equity and probate jurisdiction in the superior court. One judge of the superior court sitting in equity cannot control another sitting in probate.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. William R. Daingerfield, Judge.

The facts are stated in the opinion of the court.

John B. Mhoon, and Edward C. Harrison, for Appellants.

W. B. Treadwell, for Plaintiff, Respondent.

Edward F. Treadwell, for E. B. Mastick et al., Respondents.

William A. Beatty, and Shortridge, Beatty & Brittain, for William G. Toland, Respondent.

Wilson & Wilson, for Grace Church, Respondent.

TEMPLE, J.—This action was brought by the administrator with the will annexed of the estate of Mary B. Toland, deceased, for the purpose of having the probate court instructed as to what distribution shall be made of the estate

under the will. There is a general averment in the complaint that differences exist between plaintiff and the defendants and among the defendants themselves, by reason of which plaintiff is unable to properly administer said estate, and some of the doubts relate to controversies not within the jurisdiction of the court sitting as a court of probate. But nowhere in the complaint is it shown that the administrator has any doubt as to anything he is required to do, and when the doubts stated are fully considered it is manifest that there is no embarrassment whatever as to the proper mode of performing his trust in the administration of the estate. The parties simply differ as to what distribution shall be made of the residue of the estate after the administration has been completed. Plaintiff sues in his representative and also in his individual capacity. In his representative capacity he has no interest in the questions he seeks to raise. It is alleged that E. B. Mastick and George H. Mastick contend that certain rents are by the terms of the will given to them. This certain other defendants deny, and claim that such rents under the will belong to a fund for the payment of legacies. These are matters to be determined in the decree of distribution, and the doubts do not embarrass to any extent the administration. Ample funds are provided for the payment of the legacies, whatever conclusion may be reached upon that subject. There are no doubts as to whether it is necessary to provide, by sale or otherwise, a larger fund to pay legacies if these rents are given to E. B. and George H. Mastick.

Plaintiff contends as an individual that he is entitled under the will to an undivided one-half of the proceeds of a sale ordered in the will, while certain defendants contend that plaintiff is entitled only to one-half of what will remain in such fund after the debts, the expenses of administration, and legacies have been paid out of it. To determine these questions is a function of the decree of distribution, and it is not at all important that they should be sooner determined.

The jurisdiction of a court of equity cannot be brought into action on the ground that a trustee is seeking instruction as to the proper mode of executing his trust (conceding that under our system such could ever be a ground of jurisdiction, which I do not), for the will creates no trust estate and the

questions are purely legal. Pomeroy says that the present doctrine, where courts entertain suits to construe wills, is that the jurisdiction is simply an incident of the general jurisdiction of courts of equity over trusts; and "that a court of equity will never entertain a suit brought solely for the purpose of interpreting the provisions of a will without any further relief, and will never exercise a power to interpret a will which only deals with and disposes of purely legal estates and interests, and which makes no attempt to create any trust relations with respect to the property donated." (3 Pomeroy's Equity Jurisprudence, sec. 1156.)

This proceeding would not be tolerated even in those jurisdictions where it is still held that courts of equity may, under some circumstances, interfere to interpret trusts created by wills during administration.

But I think such a suit cannot be maintained under our system in any case. Nor do I think the question is as to whether the jurisdiction of courts of equity in this state is as extensive as was formerly the jurisdiction of the courts of equity in England. There is no controversy here as to jurisdiction between the courts of law and courts of equity. Both jurisdictions are vested in the same courts, and such matters are only material in determining the character of the remedy to which the party may be entitled in a particular case.

The legislature has provided a special proceeding for the administration of the estates of deceased persons, whether testate or intestate. For the conduct of this special proceeding a minute code has been provided, through which every purpose for which resort was formerly had to courts of equity is attained. In England, only personalty was involved in the administration, but the relation of the personal representative to the creditors, legatees and distributees was such, and the relief afforded in ecclesiastical courts so inadequate, that this was the most important branch of chancery jurisdiction. (1 Pomeroy's Equity Jurisprudence, sec. 77.)

In the probate proceeding provision is made for the presentation and allowance of the claims of creditors, and, when the assets of the estate have been fully ascertained, upon notice the claims of creditors are ordered paid, if the assets are

insufficient to pay all, in a certain order. Certainly, this provision must be exclusive of the jurisdiction of a court of equity to marshal the assets and to direct the payment of claims.

If a legacy falls due, or a partial distribution of an intestate estate should be made, the probate court can order the personal representative to make the payment or distribution. This will also be done upon notice, and, the proceeding being *in rem*, when such notice is given the whole world is brought in. Surely, this must be exclusive of a suit in equity in which the parties are necessarily limited.

The same is true as to the settlement of the accounts of the administrator or executor. Elaborate provision is made to force the executor or administrator to account, and in this accounting the creditors and distributees are interested. In an insolvent estate it is a necessary preliminary to the marshaling of the assets for payment of creditors, and it is always a necessary preliminary to a final distribution. This settlement made after the prescribed notice is conclusive upon all interested parties.

But the most conclusive reason, to my mind, why this jurisdiction must be held to be exclusive is that, under our probate system, all deraignment of title to the property of deceased persons is through the decree of distribution entered as the final act in the administration of an estate, whether testate or intestate. No one will contend that this decree can be made by any other court or in any other proceeding. It constitutes not only the law of the personalty, but also of the real estate. In other jurisdictions this decree is also held to be conclusive. But generally it concerns only personal property, and the power to make it does not involve the power to construe trusts in land created by the will. Here the probate court not only may, but should, and often must, construe the trusts created by the will. After the decree is made the will practically drops out of existence. The law of the estate is the decree and not the will, and, as I have said, all deraignments of title are through it. (*Goad v. Montgomery*, 119 Cal. 552.¹)

The proceeding differs much from the systems of administration where the personal property goes to the personal

¹ 63 Am. St. Rep. 145.

representative and the land to the heir. Here the relation of the probate court to the executor or administrator is much more analogous to the relation of a court to its receiver. And here, too, the entire probate proceeding from the grant of administration, or the probate of a will, is calculated to give notice to the heirs of a decedent, and special notice is required to be given of the time when distribution will be made, where all interested parties can be heard. The distribution is declared to be conclusive upon the whole world.

It is no small consideration, in my opinion, that this probate proceeding is in the same court in which a suit would be brought to construe the will. The special proceeding may as well be in the nature of a proceeding in equity as at law, and it is before the same chancellor to whom it would be necessary to appeal in a personal action to instruct the administrator or executor and the court as to the proper construction of the will. If it were found necessary or convenient to embody such construction in an order so that appeal could be taken to the supreme court, this could easily be provided for in the proceeding. Why should Judge Coffey, sitting in probate, be instructed by Judge Coffey, sitting in a case in equity brought for that purpose?

If it is necessary or proper to appeal to a court of chancery, the probate court is such a court, and the proceeding is in fact for that purpose. It is the same court when sitting in matters of probate, and may exercise all equity powers necessary for a complete administration. (*Estate of Burton*, 93 Cal. 459.)

The cases relied upon to sustain this action, with the exception of *Williams v. Williams*, 73 Cal. 99, all arose under the former constitution. In the mentioned case *Rosenberg v. Frank*, 58 Cal. 387, was followed without noticing that it arose under a different judicial system.

The probate proceeding then was not in the court presided over by the same chancellor before whom the action to obtain a construction of the trusts would be brought. The supreme court had held that the probate court was an inferior court. While I do not wish to conceal my opinion that a wrong view was taken in those cases, the intention that the jurisdiction of the court sitting in probate should be exclusive

was not so obvious under that judicial system, and it was quite natural that lawyers trained under a different procedure should for a time fail to appreciate the change, and the early cases show this.

Wilson v. Roach, 4 Cal. 362, was an action against a guardian to compel him to account. The court said that district courts were vested with the jurisdiction by the constitution, and the legislature could not deprive them of the jurisdiction. The reasoning has no application now. The legislature has not attempted to deprive any court of its jurisdiction. It has only provided a mode in which that jurisdiction shall be exercised.

Clarke v. Perry 5 Cal. 59,² was an action against an administrator to compel an accounting. He had accounted to the probate court, but it was contended that he had not fully accounted. The court held that one who was not an actual party to the accounting had in the probate court was not bound by it, and could proceed to enforce a full accounting in the district court. This was upon the ground that the probate court was of inferior and limited jurisdiction.

Deck v. Gerke, 12 Cal. 433,³ was a case to compel an accounting and a distribution. Judge Baldwin commenced his opinion with the statement that, apart from previous decisions, it would be doubtful if the probate court had not exclusive jurisdiction, but he says the probate courts are courts of special and limited jurisdiction, and under the decisions courts of chancery have assumed jurisdiction; the principle asserted is more convenient in practice, and it is too late to question the jurisdiction.

Payne v. Payne, 18 Cal. 292, was a controversy submitted without action as the statutes permitted, and no question of the right in that mode to interfere with probate proceedings was raised or discussed.

In *Rosenberg v. Frank*, *supra*, the point was the first time fully considered. That was also a consent case, and the remarks made upon the subject were evidently in reply to objections raised by a member of the court and set forth in a dissenting opinion. One argument urged in the dissenting opinion was that courts of chancery formerly took jurisdiction of cases of administration because the probate jurisdic-

²63 Am. Dec. 82.

³73 Am. Dec. 555.

tion then existing was a "lame jurisdiction," and that under our system it was not so. The reply is, in effect, that all existing equity jurisdiction was by the constitution vested in the district courts, and the fact that other courts were vested with some equity jurisdiction did not limit the jurisdiction of the district court in the absence of prohibitory language in the constitution, or unless it appeared affirmatively that the jurisdiction conferred upon the other court was intended to be exclusive. It was also held that while the legislature could give to the probate court such probate jurisdiction as it saw fit, it could not take away from the district courts "any of the equity jurisdiction conferred on them by the constitution"; and it was also said that "the probate court held its jurisdiction subject to the exercise of this jurisdiction of the district court."

Rosenberg v. Frank, supra, arose under the former constitution, and much of this reasoning has no force whatever as applied to our present judicial system. There is no possible question now as to what courts have probate jurisdiction, nor whether courts of equity do or do not have jurisdiction over matters of administration. The superior court has full chancery jurisdiction, and also probate jurisdiction, and a special proceeding *in rem* has been prescribed to it in which it is required to administer estates, whether testate or intestate. And, I repeat, there is no occasion in this case to determine whether while sitting in probate it is acting as a court of equity or not. It is clearly within its admitted jurisdiction, and further we need not go. We need not inquire under what branch of jurisdiction the particular proceeding comes, much less reasonable would it be to say that because formerly courts of chancery took cognizance of matters of administration on the ground that the jurisdiction of the ecclesiastical courts was a "lame jurisdiction," one judge of this court, calling himself a chancellor sitting in a case in equity, can interfere to control another judge in the same court sitting in probate.

The proceeding is entirely statutory, and it is true that in some sense the court in this special proceeding is exercising a special and limited jurisdiction. The mode and procedure limit its jurisdiction. It is not there authorized to decide controversies not strictly within the probate proceedings. Ex-

cept in the case of creditors it has no jurisdiction to determine claims adverse to the estate itself. Such was *Griggs v. Clark*, 23 Cal. 427. The remark made by Judge Crocker, and quoted as authority here, might as well have been made in an action of ejectment. It was not denied that such an action could be brought in a court of equity, nor was it claimed that the probate court had any jurisdiction over the matter. Executors and administrators have frequent occasion to sue and are often sued in other courts. But I do not see what that has to do with the matter under discussion here. To determine such controversies is not within the scope of the proceeding in probate; nor, except as to creditors, does the court in that proceeding acquire jurisdiction over controversies or persons not claiming under the decedent. And it may be said that creditors do so. They are given by statute a right as to the estate and to share in some sense in its distribution.

This matter was really determined in *Goad v. Montgomery, supra*. It was there said: "It would be an anomaly in jurisprudence that a court which is vested with full jurisdiction in matters of probate should be controlled in the exercise of that jurisdiction by the action of a co-ordinate court which has neither controlling nor revisory jurisdiction in such matters. The court was not required to follow that judgment, but could distribute the estate in accordance with its own views." That being so, a judgment in this case one way the other could not affect the proceeding in the probate court, and would afford no protection to the administrator, if he were required to base any action upon it. It would, in fact, be a void judgment.

The judgment is reversed and the cause remanded, and the superior court is directed to dismiss the action.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[S. F. No. 2064. In Bank.—July 10, 1900.]

J. P. JARMAN, Respondent, v. JAMES W. REA, Appellant.

APPEAL—DISMISSAL—DEFECTIVE UNDERTAKING—"INSUFFICIENCY"—NEW UNDERTAKING.—Where an undertaking on appeal is so defective as to amount to the entire absence of an undertaking, the appeal must be dismissed; but where the undertaking is not so defective, but is merely "insufficient" within the meaning of section 954 of the Code of Civil Procedure, a new undertaking sufficient in form, and approved by a justice of this court will be allowed to be filed herein before the hearing of a motion to dismiss the appeal, in which case the appeal cannot be dismissed.

ID.—FAILURE OF UNDERTAKING TO PROVIDE FOR DISMISSAL.—An undertaking on appeal which provides that appellant will pay all damages and costs which may be awarded against them on the appeal, but which omits the clause "or on a dismissal thereof," is not a totally defective undertaking, which absolutely requires the dismissal of the appeal, but is objectionable only for "insufficiency," which may be remedied by the filing of a new undertaking in this court.

ID.—WANT OF SPECIFICATIONS IN TRANSCRIPT.—The objection that the transcript does not contain any specifications of the errors of law, or the particulars in which the evidence is insufficient, is not ground for a motion to dismiss the appeal, and cannot be considered upon such a motion.

MOTION to dismiss an appeal from a judgment of the Superior Court of Santa Clara County and from an order denying a new trial. A. S. Kittredge, Judge.

The facts are stated in the opinion of the court.

H. V. Morehouse, F. J. Hambly, D. W. Burchard, and F. M. Rea, for Appellant.

D. M. Delmas, Edwin A. Wilcox, and A. H. Jarman, for Respondent.

HARRISON, J.—The respondent has moved to dismiss the appeal herein upon the ground that the undertaking on appeal provides only that the appellants will pay all damages and costs which may be awarded against them on the appeal, and does not contain the clause "or on a dismissal thereof,"

which is required by section 941 of the Code of Civil Procedure. Before the hearing upon the motion the appellant presented a good and sufficient undertaking, which was approved by the chief justice and filed with the clerk of this court, and contends that for that reason the motion should be denied.

Although the right of appeal is to be liberally construed, yet the party who has recovered a judgment against another ought not to be subjected to further cost in sustaining such judgment if it was properly rendered, or to delay in its enforcement, and for the purpose of indemnifying him in these respects an undertaking on appeal is provided for by statute. Section 940 of the Code of Civil Procedure declares that "the appeal is ineffectual for any purpose" unless an undertaking, "as hereinafter provided," is filed within five days after service of the notice of appeal. The character and terms of the undertaking are given in section 941, and section 954 provides: "No appeal can be dismissed for insufficiency of the undertaking thereon if a good and sufficient undertaking, approved by a justice of the supreme court, be filed in the supreme court before the hearing upon motion to dismiss the appeal." The respondent is in all cases entitled to such an undertaking as is prescribed in section 941, and if the appellant, after notice of a motion to dismiss his appeal for want of such undertaking, fails to present a sufficient undertaking before the hearing of the motion, his appeal will be dismissed, even though the defect be merely "insufficiency." (*Estate of Fay*, 126 Cal. 457.) The above provision of section 954 contemplates that, although an undertaking has been filed, it may be of such a character or in such a form as not to fully indemnify the respondent against the costs and damages which he may sustain by reason of the appeal. The use of the phrase "insufficiency of the undertaking" indicates a distinction between an undertaking which does not fully comply with all the terms of section 941 and the entire absence of an undertaking. An undertaking may be filed which is so defective as not to constitute any obligation upon the sureties therein, and which is in reality no undertaking at all. In such a case there is more than mere "insufficiency." There is an entire want of indemnity to the respondent, and section 954 has no application. In *Home etc. Associates v. Wilkins*,

71 Cal. 626, there were appeals from two separate orders, and a single undertaking which did not distinctly refer to either appeal. It was held that it was so ambiguous that it must be regarded as if none had been filed, and that to permit a new undertaking to be filed under section 954 would be in effect to permit a new appeal to be perfected after the time fixed by law. The same ruling was made in *Centerville etc. Co. v. Bachtold*, 109 Cal. 111; *Estate of Heydenfeldt*, 119 Cal. 346. In *Clarke v. Mohr*, 125 Cal. 540, the undertaking was executed before the order denying a new trial had been made, and for this reason it was held that there was no consideration for its execution. (See, also, *Hibernia, etc. Soc. v. Freese*, 127 Cal. 70; *Stackpole v. Hermann*, 126 Cal. 465.)

On the other hand, the undertaking may be defective in the form in which it is framed, and yet sufficiently indicative of an intent to comply with the terms of the statute as to be binding upon the sureties, or it may be defective in that it indemnifies the respondent against only a portion of the costs and damages that may be awarded him. There is in such cases a mere "insufficiency," which under section 954 may be remedied by the filing of a sufficient undertaking. In *Spreckels v. Spreckels*, 114 Cal. 60, there were two appeals, one from the judgment and the other from an order, which were properly recited in the undertaking, and the sureties stipulated that the appellants would pay all costs and damages which might be awarded against them "on the appeals or either of them, or on the dismissal thereof, or of either of them." This was held to be a sufficient compliance with the statute, although the penal sum of the undertaking was six hundred dollars in gross, instead of three hundred dollars for each of the appeals. In *Bay City Assn. v. Broad*, 128 Cal. 670, the body of the undertaking was sufficient in form, but its execution by one of the sureties was informal. The undertaking was held to be merely insufficient, and a new one was permitted to be filed.

It cannot be said in the present case that there is an entire want of the undertaking provided by section 941. The sureties undertake that the appellant "will pay all damages and costs which may be awarded against him on the appeal." The omission of a similar provision in case of a dismissal of the ap-

peal does not defeat or impair the undertaking in case there should be an affirmance of the judgment. The undertaking is merely defective in failing to provide for indemnifying the respondent in case the appeal should be dismissed. This must be held to be only an "insufficiency," which may be remedied by the filing of another undertaking.

The ground for the dismissal set forth in the notice of motion, that the transcript does not contain any specifications of the errors of law, or the particulars in which the evidence is insufficient to support the verdict, relates to the form and sufficiency of the specifications, and cannot be considered upon a motion to dismiss the appeal. An appeal cannot be dismissed when the entire record in the transcript must be examined for the purpose of ascertaining the sufficiency of the grounds urged in support of the motion. (See *Howell v. Howell*, 101 Cal. 115; *Randall v. Duff*, 105 Cal. 271; *Gregory v. Diggs*, 108 Cal. 123.)

The motion to dismiss the appeal is denied, and the undertaking filed herein June 29, 1900, will stand as the undertaking on this appeal.

Henshaw, J., McFarland, J., Beatty, C. J., and Van Dyke, J., concurred.

[L. A. No. 615. Department Two.—July 11, 1900.]

COUNTY BANK OF SAN LUIS OBISPO, Respondent, v.
N. GOLDTREE et al., Appellants.

FORECLOSURE OF MORTGAGE—CONVEYANCE INTENDED TO SECURE NOTE—SUFFICIENCY OF COMPLAINT.—A complaint alleging that the defendants jointly executed to plaintiff a note for a specified sum, which is unpaid, and thereafter, as security for the payment of the same defendants, conveyed to plaintiff by deeds of grant certain described real estate, and "that said conveyance of said real estate by defendants to plaintiff is and was intended by both plaintiff and defendant to secure the payment of said promissory note," states a cause of action for the foreclosure of the deeds given by way of mortgage.

1d.—ATTORNEY'S FEE STIPULATED IN NOTE—LIEN UPON LAND—ADMISSION OF AVERMENT.—Where the note alleged to be secured by the deeds of grant was set out in the complaint, and contained a pro-

vision for the allowance of attorneys' fees in case of suit, the allegation of the complaint that the conveyance was "intended to secure the payment of said promissory note," includes the contract to pay the attorneys' fees, as well as the principal and interest of the note; and where such allegation was admitted at the trial, it was proper not only to give judgment for the attorneys' fees, but also to make them a lien upon the mortgaged premises.

ID.—DECREE OF FORECLOSURE—SALE IN SEPARATE PARCELS.—Where the decree of foreclosure, in directing the sale of the mortgaged property, substantially followed the provisions of section 726 of the Code of Civil Procedure, and was in proper form under that section, if no defendant presented any equity to the court that he desired to have protected in the decree, no defendant can complain of its form. If the defendants desired to have the property sold in separate parcels, they should have proceeded to that end in accordance with section 694 of that code, by direction given at the sale, and cannot object upon appeal that the decree did not provide therefor.

ID.—DEFICIENCY JUDGMENT.—Under section 726 of the Code of Civil Procedure, which is constitutional and valid, the court was warranted in providing in the decree for the foreclosure of the deeds given by way of mortgage, for the entry of a deficiency judgment for any residue of the note left unpaid after the sale of the mortgaged premises.

APPEAL from a judgment of the Superior Court of San Luis Obispo County. E. P. Unangst, Judge.

The facts are stated in the opinion.

Graves & Graves, for Appellants.

The court was not authorized to include counsel fees in the decree of foreclosure in the absence of any stipulation in the mortgage. (*Boob v. Hall*, 107 Cal. 160.) The judgment should have provided for sale by separate parcels of property acquired under different titles and described in separate deeds to the plaintiff. (*Raun v. Reynolds*, 11 Cal. 15.) A deficiency judgment was improper in this case, where no intention to that effect can be gathered from the terms of the mortgage. (*Farmers' Loan etc. Co. v. Commercial Bank*, 15 Wis. 424.) There can be no personal liability in a foreclosure suit, wherein there is no stipulation in the mortgage therefor. (Civ. Code, secs. 2890, 2928.)

W. H. Spencer, for Respondent.

The admitted allegation of the complaint established there was a mortgage to foreclose, and sustained the decree as made. (*Brandt v. Thompson*, 91 Cal. 458.) The note secured by the mortgage established a personal liability of the defendants, and the valid law of the state provides for a deficiency judgment. (Code Civ. Proc., sec. 726.)

GRAY, C.—This is an action on a note and to foreclose certain grant deeds of land given by way of mortgage to secure the payment of said note. Defendants appeal from the judgment.

The complaint shows that defendants jointly executed to plaintiff a note for thirty-three thousand one hundred and nineteen dollars and fifty-eight cents, and thereafter, as security for the payment of the same, defendants conveyed to plaintiff by deeds of grant certain described real estate. "That said conveyance of said real estate by defendants to plaintiff is and was intended by both plaintiff and defendants, as a mortgage to secure the payment of said promissory note." The note provides for the payment of two per cent on the sum due as attorney fees in case suit is brought to collect the same. The answers of defendants consisted solely of general denials of the allegations of the complaint. At the trial the defendants admitted that each and every allegation in the complaint contained was true. In the decree an attorney's fee as provided in the note was allowed, and, with the other amounts found to be due to plaintiff, was made a lien on the lands described in the complaint. The decree was in the usual form and directed that all and singular the mortgaged premises, or so much thereof as might be sufficient to raise the amount due plaintiff, together with costs of suit and expenses of sale, and which may be sold separately without material injury to the parties interested, be sold at public auction in the manner prescribed by law. A deficiency judgment was also provided for in the decree in the usual form.

1. A conveyance by deed of grant is deemed to be a mortgage when it is intended as a mortgage to secure the payment of a promissory note or the performance of any other obliga-

tion. The complaint states a cause of action for the foreclosure of a deed given by way of mortgage. (Civ. Code, sec. 2924.) The demurrer was properly overruled.

2. The attorney's fee was properly allowed and properly made a lien on the mortgaged premises. A copy of what is called in the complaint a promissory note is set out therein, and it appears to contain, in addition to the usual terms of a promissory note, an agreement for attorney fees in case suit is brought. Following this is the allegation that the conveyance of the land was made to secure the payment of the "said note." This term "said note," as used in the complaint, evidently includes the contract to pay attorney fees previously set out as a part of the note. The truth of this allegation of the complaint having been admitted on the trial, it follows that we must treat the deeds as having been given to secure the payment of an attorney's fee, as well as the principal and interest of the note. It was proper, therefore, not only to give plaintiff judgment for an attorney's fee as provided, but also to make such fee a lien upon the mortgaged premises. There is nothing in conflict with this position in *Boob v. Hall*, 107 Cal. 160, nor in the case therein cited, *Clemens v. Luce*, 101 Cal. 432; for in the former case no agreement for an attorney's fee was alleged, and in the latter (*Clemens v. Luce*, *supra*, the terms of the mortgages confined them to securities for the payment of the principal and interest of the note, it nowhere appearing in the mortgages "that they were given as security for the payment of any attorney's fee whatever." In the cases of *Russell v. Findley*, 122 Cal. 478, and *Irvine v. Perry*, 119 Cal. 352, the agreement as to attorney fees provided for their payment only, and not that the mortgage should secure them; and it does not appear that the notes in those cases provided for the payment of any attorney's fee. In the case at bar we think it does appear from the complaint and the admission of its truth that the conveyance was made to secure the attorney's fee, for the promise to pay such fee is a part of the instrument secured.

3. The decree in directing the sale of the property substantially follows the provisions of section 726 of the Code of Civil Procedure, and is in proper form. If the defendants desired the property sold in separate parcels they should have pro-

ceeded to that end in accordance with section 694 of the Code of Civil Procedure. If any defendant had any interest in any of the lands described in the complaint that was not covered by the mortgage, or if he had any equity that he desired to have protected, he might have presented the matter to the trial court in a proper manner. It does not appear that he presented any such matter to that court in any manner; and he cannot now be heard to complain.

4. Section 726 of the Code of Civil Procedure, providing for a deficiency judgment, is not in conflict with any constitutional provision but is a valid law, and has been so recognized for upward of twenty-five years. Under it the court was warranted in providing for the entry of a deficiency judgment.

The judgment should be affirmed.

Chipman, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Henshaw, J., McFarland, J., Temple, J.

[S. F. No. 1434. Department One.—July 18, 1900.]

H. A. BELTAIRE et al., Appellants, v. GEORGE ROSENBERG & SON et al., Respondents.

ATTACHMENT—CONTRACT MADE AND PAYABLE OUT OF STATE—BILL RENDERED—ACCOUNT STATED.—Where an express contract was made in the state of New York for the manufacture and sale of hats to be shipped to San Francisco, and paid for in New York, a new and independent contract upon an account stated in this state, upon which an attachment would lie, did not arise from the sending of a bill for hats shipped, with request for return of check, the amount of which was not disputed, but to which response was made complaining of the styles and dimensions of hats shipped, and proposing to send a list of what would be desirable on this coast, and asking if the manufacturers could use a certain kind of hats which could not be disposed of, and requesting patience in money matters. An attachment based upon an account stated, under these circumstances, was properly dissolved.

ID.—ACCOUNT STATED, HOW CONSTITUTED.—An account stated, in order to constitute a contract, must show upon its face that it is intended to be a final settlement to date, which should be expressed with clearness and certainty.

ID.—EVASION OF ATTACHMENT LAW.—Where a contract is made and is payable out of this state, the requirements of the attachment law cannot be evaded or annulled by the creditor sending to his debtor in this state a note or memorandum of the amount due, and thereupon, in case the claim is not disputed, commencing proceedings in attachment as upon a new contract made in this state.

APPEAL from an order of the Superior Court of the City and County of San Francisco dissolving an attachment. John Hunt, Judge.

The facts are stated in the opinion of the court.

Fox & Gray, for Appellants.

A. Ruef, for Respondents.

VAN DYKE, J.—This is an appeal from an order dissolving an attachment. From the affidavits and exhibits used on the motion to dissolve the attachment, embodied in the bill of exceptions, it appears that the defendants reside in and do business in the city and county of San Francisco; that the plaintiffs reside in the city of New York, and are engaged in the business of manufacturing hats in said city; that on or about the first day of August, 1897, Charles Rosenberg, one of the defendants, while in said city of New York, entered into a contract with the plaintiffs for the manufacture of a large number of hats, and to ship the same when manufactured to the defendants in the city and county of San Francisco; that by the terms of the purchase so made in the city of New York it was agreed between the plaintiffs and said Rosenberg that the defendants should have sixty days' time to pay for said hats, and that such payments were to be made in New York. In accordance with this agreement of purchase the plaintiffs manufactured and shipped to the defendants said hats so purchased, and sent a statement or bill of the same, a copy of which is as follows:

"Statement.

"New York, September 30, 1897.

"M. Rosenberg & Son, San Francisco, Cal., to Beltaire, Lurch & Co., Dr., Manufacturers of Fine Stiff and Soft Hats, 22 and 24 West 3rd street. Factory, Danbury, Conn.

"60 days dating.

Aug. 13.....	\$222.00
Aug. 30.....	192.00
Sept. 8.....	186.00
Sept. 16.....	2.75
Sept. 24.....	72.00
	<hr/>
	\$674.75
Sept. 17, by mdse.....	1.00
	<hr/>
	\$673.75

"Dear Sir: Please favor us with check for above by return of mail. If not remitted for by ——— inst. we shall take the liberty of drawing for same, as is our custom.

"Respectfully yours,

"BELTAIRE, LURCH & CO."

Under date of New York, November 1, 1897, another copy of the same statement was sent by mail in a letter to defendants, in which letter they say: "We inclose herewith a statement of your account, for which we would be pleased to receive your check, as the sum is now due." To which defendants replied by letter from San Francisco, in which they say:

"In regard to the hats you sent us we have had fair success, but would have done much better if you would had sent us larger shapes and no hats lined. It is very hard to dispose of small shapes, also lined hats, on this coast. The bottle green hats we could not dispose of, but have sold all the other colors—can you use the same?

"As soon as we get time we will write you a list exactly what style and dimensions sell best on this coast.

"In regard to money matters, we would ask you to have patience with us until we get our returns from fall sales, which will be shortly. Yours,

"G. ROSENBERG & SONS."

The action was commenced December 9, 1897, for the sum of six hundred and seventy-three dollars and seventy-five cents, the amount contained in the statement sent out to the defendants, and the affidavit on which the attachment was issued states that the action is founded upon contract, to wit, an account stated, which was made in this state.

It is not disputed on the part of the appellants that the transaction between the parties was as stated—that is, the contract of purchase of the goods was made in New York by one of the defendant firm with the plaintiffs, to be paid for on sixty days' time in the city of New York upon the delivery of the goods here. But it is contended that a new contract sprang up in the nature of an account stated upon the receipt here by the defendants of the bill of the goods mailed by plaintiffs in New York, inasmuch as said defendants did not repudiate or refuse to pay said bill.

To constitute an account stated "it must appear that at the time of the accounting certain claims existed, for and concerning which an account was stated; that a balance was then struck and agreed upon, and that defendant expressly admitted that a certain sum was then due from him as a debt. Hence, it follows that an account cannot be stated with reference to a debt payable on a contingency." (2 Chitty on Contracts, 11th Am. ed., 962.) Here it is shown from the correspondence between the parties that the defendants, upon receiving the bill of goods, wrote to the plaintiffs that they were unable to dispose of certain kinds of hats sent out, and said: "Can you use the same?" It appears, also, that other hats were to be ordered.

In speaking on an account stated, this court in *Coffee v. Williams*, 103 Cal. 556, says: "But the account, in order to constitute a contract, should appear to be something more than a mere memorandum; it should show upon its face that it is intended to be a final settlement up to date. And this should be expressed with clearness and certainty." The facts here did not bring this case within the rule in reference to an account stated so as to constitute a new and independent contract. According to the contention of appellants, in case of any contract made and payable outside of this state it would only be necessary for the creditor to send to his debtor in this

state a note or memorandum of the amount due, and thereupon, in case the claim was not disputed, commence proceedings in attachment as upon a new contract made in this state. This would be a simple and easy mode of annulling or evading the law authorizing the summary process of attachment. We cannot agree with this contention of appellants; it would not be in accordance with the letter or spirit of the law, which permits an attachment only "where the contract is made or is payable in this state."

"Proceedings by attachment are statutory and special, and the provisions of the statute must be strictly followed, or no rights will be acquired thereunder." (*Gow v. Marshall*, 90 Cal. 567; *Rudolph v. Saunders*, 111 Cal. 233.)

The order is affirmed.

Harrison, J., and Garoutte, J., concurred.

[S. F. No. 1273. Department One.—July 18, 1900.]

JAMES DOWDELL et al., Appellants, v. CHARLES CARPY et al., Respondents.

MALICIOUS PROSECUTION—CONSPIRACY OF DEFENDANTS—GRAVAMEN OF ACTION.—An action will not lie for a mere malicious conspiracy wrongfully to prosecute an action. In an action for the malicious prosecution of a civil action, where a malicious conspiracy of the defendants is alleged, the *gravamen* of the action is not the conspiracy, but the injury to the plaintiff, arising from the malicious prosecution of the action.

ID.—WANT OF PROBABLE CAUSE—TERMINATION OF PROSECUTION—INSUFFICIENT COMPLAINT.—A complaint in an action for the malicious prosecution of a civil action, which does not aver that the alleged prosecution was without probable cause, as well as malicious, nor that it had terminated before the action was brought, is fatally defective.

ID.—JUDGMENT FOR PLAINTIFF—REVERSAL UPON APPEAL—QUESTION OF PROBABLE CAUSE.—An averment that a judgment was rendered in favor of the plaintiff in the action alleged to have been maliciously prosecuted, and that it was reversed upon appeal, does not tend to show or raise a presumption that the action was without probable cause; but the rendition of the original judgment for the plaintiff would rather show probable cause for bringing the action notwithstanding its ultimate reversal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George H. Bahrs, Judge.

The facts are stated in the opinion of the court.

Rogers & Paterson, for Appellants.

Daniel Titus, and Bigelow & Titus, for Charles Carpy, J. H. Wheeler, and California Wine Makers' Corporation, Respondents.

H. M. Barstow, for Owen Wade, Respondent.

Chickering, Thomas & Gregory, for California Wine Association, Respondent.

VAN DYKE, J.—The demurrer to the complaint was sustained, and the appeal is taken from the judgment entered thereon. The sufficiency of the complaint is the only question presented on appeal. It is contended on the part of the appellants that the action is for the recovery of damages for a conspiracy between defendants to injure plaintiffs. The case cited and relied upon to support this theory is *Dreaux v. Domez*, 18 Cal. 83. That was an action, however, for malicious prosecution. Several defendants were embraced in the action, the complaint averring "that the defendants contriving and maliciously intending to injure the plaintiff, etc., procured him to be indicted." A demurrer was interposed, among other grounds, because no averment was made of any joint agency on the part of the plaintiffs in instituting the prosecution, which demurrer was overruled. It is said in the opinion on the appeal: "It is well settled that this action for malicious prosecution will lie against several defendants. It is argued, however, that a conspiracy must be averred. It is true that an action lies for a conspiracy unjustly to prosecute a defendant; but we apprehend that this action is somewhat different, in form at least, from an action on the case for a malicious prosecution. The gist of this action is the malicious prosecution; that of the other is the conspiracy—the combining of two or more to do an unlawful and injuries act. In the first case we apprehend the cause of action is complete before an acquittal; in the other, the acquittal or

termination of the prosecution is necessary to enable the plaintiff to maintain the suit. But, however this may be, we think that it would be holding the rule to unnecessary strictness to hold that the defendants are not sufficiently and clearly charged with a joint act, when but one general offense is charged, and this averred to be committed by all with the same unlawful motive, and that they all contrived to effect it."

The language of the opinion is not very clear. There seems to be an ambiguity as to which action reference is made, whether to malicious prosecution or conspiracy. It is stated that the cause of action is complete before acquittal. If in reference to an action for malicious prosecution, it is against all the authorities; and a mere conspiracy, without carrying out the purposes of the conspiracy or perpetrating some wrong, is not the ground for a civil action.

In *Saville v. Roberts*, 1 Ld. Raym. 378, Chief Justice Holt said: "An action will not lie for the greatest conspiracy imaginable if nothing be put in execution, but if the party be damaged the action will lie, from whence it follows that the damage is the ground of action." And in *Herron v. Hughes*, 25 Cal. 560, this court says: "A simple conspiracy, however atrocious, unless it results in actual damage to the party, never was the subject of a civil action, and, though such conspiracy be charged, the averment is immaterial and need not be proved. When two or more are sued for a wrong done, it may be necessary to prove a previous combination in order to secure a joint recovery, but it is never necessary to allege it, and, if alleged, it is not to be considered as of the gist of the action. That lies in the wrongful and damaging act done." In *Taylor v. Bidwell*, 65 Cal. 489, it is said: "The gravamen of the action is the alleged malicious prosecution. The averments of the complaint, with respect to the conspiracy of the defendants, are not of the gist of the action; that lies in the wrongful and damaging act done." In that case the complaint averred, in substance, that the defendants confederated together for the purpose of falsely charging the plaintiff and maliciously prosecuting him for the crime of arson. In the present case the complaint charges the defendants with conspiring and combining together to prosecute a civil action for the purpose of obtaining a judgment of fore-

closure and selling property of the plaintiff thereunder, wrongfully procuring the appointment of a receiver therein, and for dissuading parties from bidding at said foreclosure sale, thereby injuring their business and sacrificing their property, to their damage, etc.

Parker v. Huntington, 2 Gray, 124, was an action to recover damages against the defendants for conspiring together to maliciously prosecute the plaintiff upon a charge of perjury. The question arose as to whether the case was an action for conspiracy or for malicious prosecution. The court used the following language: "By the ancient forms of pleading, all actions for malicious prosecution where two or more were made defendants were laid with a charge of conspiracy. This practice is supposed to have had its origin in the phraseology of the statute of 21 Edward I, which gave the form of writs in such cases by using the words '*do placito conspirationis et transgressionis*.' But the charge of conspiracy was never deemed essential to an action, and in modern times this form of allegation has fallen into disuse. By the rules of common law an action of conspiracy, or, to use an equivalent expression, a writ of conspiracy, was never allowed but in two cases—one for conspiracy to procure a man to be indicted for treason; the other for conspiracy to prosecute a man for felony by which life was put in danger. This form of action, however, has become obsolete in those cases where it was allowed at common law, having been superseded by an action on the case in the nature of a conspiracy, which furnishes an adequate and more liberal remedy for malicious prosecutions of every nature and description. . . . The gist of the action is not the conspiracy, but the damage done to the plaintiff by the acts of the defendants, and that is equally great, whether it be the result of a conspiracy or the act of a single individual. The insertion in the declaration of the averment that the acts were done in pursuance of a conspiracy does not change the nature of the action."

In this case, likewise, the *gravamen* of the action is the alleged malicious prosecution, and to support such action it must appear that the prosecution complained of was not only malicious but without probable cause, and that such prosecution has terminated. In this case the complaint shows

that the prosecution complained of resulted in a judgment in the superior court in favor of the plaintiff therein, that an appeal was taken and such judgment was reversed. By reference to the case in this court (*Carpy v. Dowdell*, 115 Cal. 677), it appears that a new trial was ordered. And it is not alleged, nor does it appear from the complaint, that the litigation complained of had terminated before this action was brought, and the fact that the first judgment was reversed does not raise a presumption of want of probable cause. The recovery of a judgment in a court of competent jurisdiction would rather show probable cause for bringing the action, although such judgment may subsequently be reversed on appeal. It does not appear from the complaint in this cause that there was a want of probable cause, or that the litigation or proceedings complained of were terminated, and the complaint, therefore, is fatally defective. (*Hibbing v. Hyde*, 50 Cal. 206; *Anderson v. Coleman*, 53 Cal. 188; *Holliday v. Holliday*, 123 Cal. 26; *Dennehey v. Woodsum*, 100 Mass. 195; *Closson v. Staples*, 42 Vt. 209¹; *Carpenter v. Nutter*, 127 Cal. 61.)

The demurrer was properly sustained and the judgment is affirmed.

Harrison, J., and Garoutte, J., concurred.

[L. A. No. 870. Department One.—July 18, 1900.]

In the Matter of the Estate of W. T. SHEID, Deceased. S. B. CLAY et al., Appellants, v. MARY T. WALL, Respondent.

ESTATES OF DECEASED PERSONS—SETTLEMENT OF FINAL ACCOUNT—PETITION FOR DISTRIBUTION—CONTEST OF HEIRSHIP.—Where the final account of an administrator has been settled, one claiming to be an heir of the estate may file a petition for distribution, and the court may thereupon determine a contest of heirship and order distribution to the person or persons found to be entitled to the same.

Id.—SUPPLEMENTAL STATEMENT OF ADMINISTRATOR.—The supplemental statement required to be made by the administrator after the settlement of his final account under section 1665 of the Code of Civil

Procedure, and to be filed at the hearing of the petition for distribution, is not a final account which needs to be filed, settled, and allowed before the filing of the petition for distribution.

ID.—MISNUMBERING OF PROCEEDINGS BY CLERK.—There is but one estate of a deceased person, and the mere fact that the clerk indorses different numbers upon the petition for distribution, and upon the statement of account and decree of distribution, is immaterial. They all belong to the settlement of one and the same estate.

ID.—PENDENCY OF CONTEST UNDER SECTION 1664—PETITION FOR DISTRIBUTION—ABATEMENT—JURISDICTION.—The pendency of an undetermined contest of heirship under section 1664 of the Code of Civil Procedure does not deprive the court of jurisdiction to determine the heirship upon a petition for final distribution of the estate; and such pendency is not a proper ground for abatement of such petition.

APPEAL from a decree of the Superior Court of San Luis Obispo County distributing the estate of a deceased person.
E. P. Unangst, Judge.

The facts are stated in the opinion of the court.

Charles A. Palmer, and F. A. Dorn, for Appellants.

Lanham & McCall, and W. H. Spencer, for Respondent.

VAN DYKE, J.—This is an appeal by the contestants, claiming to be heirs of said deceased, from an order and decree of distribution distributing the whole of the residue of said estate to respondent Mary T. Wall, and also from an order denying the motion of said contestants for a new trial in said matter.

W. T. Sheid died intestate March 9, 1896, in San Luis Obispo county, leaving an estate therein consisting of real and personal property. One Lacefield was appointed administrator of said estate March 25, 1896, and on May 2, 1896, notice to creditors was given. April 3, 1897, said administrator filed his final account, which was thereafter on April 15, 1897, settled and allowed. On April 5, 1897, respondent Mary T. Wall, claiming to be the only child and sole heir at law of deceased, filed an application for distribution of said estate. Appellants contested her heirship and right to distribution, and on September 22, 1897, a decree was made and entered distributing said estate to said peti-

tioner Mary T. Wall. An appeal was taken from such decree of distribution, and this court held that, as the petition for distribution was filed before the settlement of the final account, and after the filing of said account, the judgment should be reversed and the petition dismissed, and it was so ordered. (*Estate of Sheid*, 122 Cal. 528.) While the case was pending on appeal in this court, and in April, 1898, said administrator Lacefield made and filed in the court below a supplemental account, which was thereafter and upon proper notice settled and allowed, and he thereupon resigned as such administrator; and the public administrator of said county, M. Lewin, upon proper application, was appointed administrator of said estate on March 11, 1898, in place of the former administrator, and received from said former administrator the property and effects of said estate, and receipted to him therefor. On the going down of the *remittitur* the former petition of said Mary T. Wall for distribution was dismissed in pursuance of the order of this court, and thereafter, on January 19th, another petition was filed on the part of said Mary T. Wall for distribution of the residue of said estate to her as the sole heir of said deceased. The findings recite that the said petition and the oppositions and contests of the contestants, and the issue raised by the pleadings, came on regularly to be heard and were tried by the court March 17, 1899, and on March 21, 1899, were argued; and thereupon the court made an order directing the administrator of said estate to report and file on or before March 31, 1899, a statement of all receipts and disbursements by him since the rendition of the last supplemental account of the administrator of said estate; and thereafter, upon April 1, 1899, the statement was reported and filed by said administrator pursuant to the order of said court, and was thereupon settled and allowed, and the decree of distribution to respondent Mary T. Wall made and entered.

The first point made by the appellants is that the court had no jurisdiction to entertain the petition or to determine who are the legal heirs of the deceased, or to enter an order of distribution, for the reason that the petition was presented before the final account was filed, or settled and allowed. What appellants mean by the final account in this connection is

the statement furnished under the direction of the court at the hearing of the petition for distribution. And, further, it is contended that the court had no jurisdiction to settle and allow said account without notice having been given as required by section 1633 of the Code of Civil Procedure. Section 1665 of the same code, relating to the distribution of the estate, says that: "A statement of any receipts and disbursements of the executor or administrator, since the rendition of his final account, must be reported and filed at the time of making such distribution; and a settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the court and included in the order or decree, or the court or judge may order notice of the settlement of such supplementary account, and refer the same as in other cases of settlement of the accounts." This statement of receipts and disbursements is clearly not the account referred to in section 1633, as claimed by appellant, nor the final account the settlement of which must precede the application for distribution. In this case the estate was in a condition for distribution at the settlement of the account, April 15, 1897, and it simply remained in the hands of the administrator awaiting the result of the appeal from the former decree of distribution. If all accounts or statements are required to be settled in advance of an application for distribution, it would in most cases result in preventing any distribution. Upon filing the petition for distribution contests to heirship may and frequently do arise, and months, and perhaps a year or more, may elapse before such contests are finally settled. In the meantime receipts and expenditures go on, a statement of which should be furnished to the court before distribution is made and the executor or administrator discharged. The code allows these statements, submitted after the decree of distribution is applied for, to be settled at the time the decree is made, without notice, or the court may order notice to be given, and refer the same for settlement. (*Firebaugh v. Burbank*, 121 Cal. 190.)

Upon filing the petition of the public administrator to be appointed in place of Lacefield, resigned, the clerk indorsed said petition in said estate as No. 835, whereas all the former proceedings in said estate had been under the number 743.

The last petition for distribution on the part of the respondent was filed in said estate under the number 743, whereas the statement of account submitted under direction of the court by the administrator and the decree of distribution were filed and made under No. 835, and the contestants, therefore, make the point that the petition is in one proceeding, and the settlement of account and decree of distribution on another. There is nothing in this contention. There is but one estate, and the mere fact that the clerk indorsed different papers with different numbers can make no difference. They all belong to the settlement of one and the same estate.

The contestants, upon the expiration of the year from the issuance of letters of administration in said estate, filed a petition in pursuance of section 1664 of the Code of Civil Procedure to determine heirship in their favor, which proceeding was pending, but not at issue, at the time of the order and decree of distribution appealed from. The pendency of this proceeding was set up by way of a plea in abatement, and it is contended on the part of the appellants that the court had no jurisdiction to hear and determine the petition for distribution while such proceedings were pending and undetermined. This contention is not tenable. The section in question itself states that nothing therein "shall be construed to exclude the right upon final distribution of any estate to contest the question of heirship, title, or interest in the estate so distributed, where the same shall not have been determined under the provisions of this section." (See, also, *In re Oxart*, 78 Cal. 109; *Estate of Sheid, supra*.)

Appellants make objections to some of the rulings of the court at the hearing of the petition for distribution, but, having failed to discuss them in their brief, they will not be considered by the court.

The decree of distribution and order denying a new trial are affirmed.

Harrison, J., and Garoutte, J., concurred.

[L. A. No. 708. Department One.—July 18, 1900.]

A. I. STEWART, Respondent, v. W. I. HOLLINGSWORTH, Appellant.

SALE AND EXCHANGE OF MACHINES—FALSE REPRESENTATIONS—RESCISION—CANCELLATION—JUDGMENT FOR VALUE.—In an action to enforce the rescission of a contract for the exchange of street sweeping machines and a written obligation of plaintiff to pay an agreed difference, upon the ground of false and fraudulent representations made by the defendant, specifically alleged in the complaint, and found by the court to have been made, and to have induced the contract, where it appeared that the defendant had taken possession of the machine delivered by him, and refused to return the written obligation, or plaintiff's machine, the value of which was alleged in the complaint, the court may render judgment for the plaintiff canceling the obligation, and for the recovery of the value of his machine, instead of for its possession, as prayed for, evidence and a finding upon the subject of such value being within the case made by the complaint, and within the issue.

ID.—APPEAL FROM JUDGMENT—ABSENCE OF EVIDENCE—FINDINGS—OMISSION.—Upon an appeal from the judgment taken upon the judgment-roll alone, without any bill of exceptions, or showing of what evidence was given, the findings made are conclusive; and the omission to make findings upon issues presented by a cross-complaint is not ground for a reversal of the judgment.

ID.—CROSS-COMPLAINT—CONDITIONAL SALE—RETAKEING POSSESSION—CREDIT FOR PRICE—FINDINGS—LOSS OF CLAIM.—Under a cross-complaint averring that by the terms of the sale to the plaintiff the title to the machine was to remain in defendant until fully paid for, and that he took possession for default in payment, and resold it for plaintiff's account, and also that the machine was by the agreement to be held by plaintiff as security for payment of the price to the defendant, findings which show that the latter averment is untrue, and that the contract to pay the price was obtained by fraud and false representations, as alleged in the complaint, establish that defendant had no further claim for the price when he took possession of the machine. Such cross-complaint is covered by the complaint and the findings made by the court.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lucien Shaw, Judge.

The facts are stated in the opinion of the court.

Dillon & Dunning, for Appellant.

Kendrick & Knott, for Respondent.

HARRISON, J.—It is alleged in the complaint herein that the defendant represented to the plaintiff that a certain street sweeping machine was in every respect first-class and well adapted for sweeping streets, and had been thoroughly tested as such and found satisfactory; that by reason of such representations the plaintiff was induced to enter into a contract with the defendant, whereby the defendant promised to sell the machine to him, and the plaintiff, as the consideration therefor, agreed to and did deliver to the defendant another street sweeping machine of the value of two hundred and twenty-five dollars, together with his written obligation to pay the defendant four hundred dollars, and that he had paid the sum of seventy-seven dollars and fifty cents thereon; that the said representations of the defendant were false and fraudulent, and were known by him to be such, and were made for the purpose of inducing the plaintiff to enter into said contract, and with the intention of defrauding and cheating the plaintiff; that as soon as the plaintiff ascertained that said representations were false he notified the defendant of his rescission of the contract, and offered to return to him all that he had received thereunder, and demanded the return of the machine delivered by him to the defendant, together with the aforesaid written obligation; that the defendant had taken possession of the machine received by the plaintiff, but had not returned the written obligation or the machine received by him from the plaintiff. Plaintiff thereupon asked judgment for the rescission of the contract, and that the written obligation be canceled and delivered to him, and that he be entitled to the possession of the machine delivered by him to defendant, and also for the sum of seventy-seven dollars and fifty cents. In his answer the defendant denied the greater part of the allegations of the complaint, and in addition thereto made a cross-complaint against the plaintiff to the effect that he had made a conditional sale of the machine to the plaintiff, by the terms of which the plaintiff was to pay four hundred dollars therefor in installments, and that until full payment thereof the title to the machine should remain in the de-

fendant, and in the meantime the machine should be held by the plaintiff in trust as security for the payment of said installments, and that in case of default in such payment the plaintiff would on request return the machine to the defendant; that the plaintiff did not pay said installments of money, or either of them, and that the defendant had taken possession of the machine and sold it for the account of the plaintiff for the sum of one hundred dollars. He thereupon asked judgment against the plaintiff for the sum of three hundred dollars. The cause was tried by the court and findings made that all the allegations in the complaint were true, except that the value of the machine delivered by the plaintiff to the defendant was one hundred and seventy-five dollars instead of two hundred and twenty-five, and that there was no agreement between the parties by which the machine received by the plaintiff from the defendant should be held by the plaintiff in trust or as security to the defendant for the payment of any sum of money whatever. Judgment was thereupon rendered in favor of the plaintiff and against the defendant for the sum of one hundred and seventy-five dollars, and for the cancellation and delivery to the plaintiff of the written obligation given by him to the defendant, and that the defendant take nothing by his cross-complaint. The defendant has appealed from this judgment upon the judgment-roll alone, without any bill of exceptions.

Upon the facts alleged in the complaint the right of the plaintiff to a recovery is clear. The defendant does not deny that he received the machine from the plaintiff, nor does he deny that after he had received back from the plaintiff the machine delivered by him, he refused upon the plaintiff's demand to return the machine received from the plaintiff or the written obligation. In the absence of the evidence thereon, the finding of the court that the machine was of the value of one hundred and seventy-five dollars is conclusive, and the judgment against the defendant for this amount was properly rendered. The defendant had answered the complaint, and it was competent to receive evidence upon that subject, and it was within the case made by the complaint, and within the issue, to give judgment for the value of the machine rather than for its possession. (Code Civ. Proc., sec. 580.) The

failure of the court to give judgment for the seventy-seven dollars and fifty cents paid to the defendant by the plaintiff might have been objected to by the plaintiff, but the defendant has no reason to complain of this omission.

In the absence of any bill of exceptions or other showing that evidence was given upon the issues presented by the cross-complaint, the omission of the court to make findings upon such issues is not a ground for the reversal of the judgment. (*Himmelman v. Henry*, 84 Cal. 104; *Winslow v. Gohransen*, 88 Cal. 450; *Klokke v. Escailler*, 124 Cal. 297.)

It may be added that the facts alleged in the cross-complaint are not inconsistent with those alleged in the plaintiff's complaint, except as to the averment that the machine was to be held by the plaintiff in trust as security to the defendant for the payment of its price, and the court found that this allegation was not true. The defendant alleges that by the terms of his sale to the plaintiff the title to the machine was to remain in him until fully paid for. Consequently, when he took possession of it he had no further claim upon the plaintiff for its price, if, as found by the court, the plaintiff's agreement to pay for it had been obtained by fraud and false representations.

The judgment is affirmed.

Van Dyke, J., and Garoutte, J., concurred.

[L. A. No. 613. Department One.—July 18, 1900.]

W. S. HOOK, Manager, Respondent, v. LOS ANGELES
RAILWAY COMPANY, Appellant.

STREET RAILWAY—COMMON USE OF STREET BY TWO LINES—CONSTRUCTION OF CODE—ORIGINAL EXPENSE—REASONABLE VALUE.—Section 499 of the Civil Code, which provides for the joint use of part of the same street, not exceeding five blocks, by two lines of street railway operated under different managements, "each paying an equal portion for the construction of the tracks and appurtenances used by them jointly," as applied prospectively to a case where no track has been constructed, leaves it to the lines to agree as to the construction thereof, the expense of which is to be equally borne;

but the section also extends to a case where one line has already constructed and used its track, and another line seeks to use it under the statute, in which case the latter is not required to pay one-half the original expense of its construction, but only one-half of its reasonable value at the time of permission to use it.

ID.—PRESENT COST OF MATERIALS.—Where the court allowed and required the payment by the new line of one-half of what would have been the present cost of the new material used in the track and appurtenances at the time of its decree, in the absence of any other evidence of the reasonable value of the same at that time, the allowance of such cost is sufficient proof that that was its reasonable value.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lucien Shaw, Judge.

The facts are stated in the opinion of the court.

Bicknell, Gibson & Trask, for Appellant.

Edwin H. Lamme, for Respondent.

HARRISON, J.—In March, 1897, the defendant, under and by virtue of a franchise granted to it by the city of Los Angeles, constructed and has since maintained and operated by electricity a double-track street railroad along several streets in said city, including a portion of Seventh street. In August of that year the plaintiff, to whom the city had previously granted a franchise to construct and operate a street railroad on certain streets therein, including four blocks from Lake to Rampart streets upon the portion of Seventh street occupied by the defendant, applied to the defendant for permission to intersect the tracks and appurtenances constructed by it on said portion of Seventh street, and to operate thereon cars along the tracks of the defendant and tendered to the defendant the sum of eighteen hundred and sixty-seven dollars and fifty cents, as one-half of the cost of constructing the same along said portion of the street. The defendant refused to grant the request, and the plaintiff thereupon brought the present action to obtain an order authorizing him to make such intersection and to use the tracks and appurtenances jointly with the defendant, and that the court should determine the amount of money to be paid therefor by the defendant. The court found that the construction of that

portion of the defendant's road which the plaintiff seeks the right to enter upon and use cost the defendant five thousand nine hundred and sixty-eight dollars and ninety-eight cents; that the rails used in said construction were purchased by the defendant in the fall of 1895, and were not purchased especially to be used in the construction of this road, but were carried and held by it as a part of its stock of supplies to be used in connection with the street railroads belonging to it; that the material used by it in said construction would have cost if purchased at the time of the construction, to wit, in March, 1897, four thousand eight hundred and seventy dollars and eight cents. The only items upon which there was any variance between what they cost to the defendant when purchased by it, and what they would have cost if purchased by it at the time of the construction, were the rails in which there was a difference in cost of nine hundred and twenty dollars, and the ties, in which there was a difference in cost of seventy-nine dollars.

Upon these facts the court held that upon payment to the defendant of the sum of two thousand four hundred and thirty-five dollars and four cents the plaintiff had the right to intersect the defendant's road and connect his own road therewith and use the same jointly with the defendant. Plaintiff thereupon paid this amount into court for the use of the defendant, and a decree was entered in his favor accordingly. From this judgment the defendant has appealed bringing the cause here upon the judgment-roll alone.

Section 499 of the Civil Code is as follows: "Two lines of street railway operated under different managements may be permitted to use the same street, each paying an equal portion for the construction of the tracks and appurtenances used by said railways jointly; but in no case must two lines of street railway operated under different managements use the same street or tracks for a distance of more than five blocks consecutively."

The sole question involved in this appeal is the construction to be given to this section. Its language is not free from ambiguity, but we are of the opinion that the superior court correctly construed it in its application to the present case.

The section is in its terms prospective for each of the two-lines of street railway, and, literally construed, applies to a case where permission is given to them to use a street in which no track has yet been constructed. In such a case the construction of the track and appurtenances would be a matter of contract between the two lines, under which the expense of the construction would be borne in accordance with the provisions of the section. A proper interpretation of the section, however, extends its provisions to a case in which a franchise is granted to operate a street railway over a portion of a street on which another railway has already been constructed and is in operation. The section itself does not use the term "cost" or "value" in defining the rights and obligations of the two, but states that each shall pay an equal portion "for the construction," without specifying of what the "portion" consists. This ellipsis may be reasonably supplied by holding that the legislature intended that in the absence of some unusual or controlling circumstance each should contribute one-half of what would be the reasonable expense "for the construction," if at the time the right to use the same is sought both lines were for the first time preparing to make a joint use of the street, and to construct tracks and appurtenances thereon. It would be manifestly unjust to require payment of one-half of the money which may have been paid for the construction of the tracks and appurtenances which have become greatly dilapidated, or which may have been constructed at a time when materials were much more expensive. The owner of the road that had been thus constructed would receive the full compensation intended by the statute if he should be paid one-half of the value of the track and appurtenances at the time the other is permitted to make use of them.

The court allowed to the defendant herein one-half of what would have been the cost of the material at that time, and, in the absence of any other evidence thereon, this was sufficient evidence that that was its reasonable value.

The judgment is affirmed.

Van Dyke, J., and Garoutte, J., concurred.

[L. A. No. 777. Department One.—July 18, 1900.]

EMILY J. HIGGINS, Respondent, v. SAN DIEGO SAVINGS BANK, Appellant.

APPEAL—REFUSAL TO STRIKE OUT IRRELEVANT MATTER—IDENTIFICATION IN RECORD.—In the record upon appeal from an order refusing a motion to strike out certain parts of a complaint as redundant, unnecessary, and irrelevant, which are referred to in the motion by page and line of the pleading, the transcript should identify the matter to which the motion was addressed.

ID.—HARMLESS ERROR.—Where the record shows that the cause was tried upon its merits, and that no substantial right could have been affected by the ruling of the court in refusing to strike out immaterial matter which should have been stricken out as irrelevant, the error will be deemed harmless, and in such case the judgment will not be reversed.

ID.—UNNECESSARY FINDINGS—ADMISSIONS IN PLEADINGS.—Undenied allegations of the complaint require no findings; but it is not error to make such findings, and it cannot be assumed that such findings were purposely made burdensome upon the appellant.

FORECLOSURE—ANNUITY OF WIFE CHARGED UPON HUSBAND'S LAND—PURCHASE BY SUBSEQUENT MORTGAGEE—FUTURE INSTALLMENTS—SECOND ACTION.—A wife who has foreclosed a lien for installments due upon a life annuity charged upon her husband's land by an agreement of separation, and has purchased part of the land in satisfaction thereof, under a decree which allowed a subsequent mortgagee to sell the land subject to the wife's lien, but which did not provide for future installments, or for sales upon motion, may maintain a second action against such mortgagee, who purchases the land subject to her lien, to sell other portions thereof for further installments which have become due upon the annuity.

ID.—PRACTICE UPON FORECLOSURE FOR PART OF DEBT—JUDICIAL ASCERTAINMENT OF FUTURE DEBT.—Upon foreclosure of a lien or part of a debt which has fallen due, if the decree judicially ascertains and adjudicates the amounts of the debt yet to fall due, and makes provision for applying to the court upon motion for sale of more of the premises charged with the lien to satisfy the same, the proper practice is to file a motion in the cause reciting the proceedings and alleging that other installments of the debt have become due, and asking for a sale of the property. But when there is no such judicial ascertainment or provision in the decree, such motion is not proper, and a second action should be brought to sell other portions of the land for a portion of the debt which has subsequently become due.

APPEAL from a judgment of the Superior Court of San Diego County. J. W. Hughes, Judge.

The facts are stated in the opinion.

N. H. Conklin, for Appellant.

A. H. Sweet, for Respondent.

CHIPMAN, J.—Action to enforce the lien upon real estate created by a contract entered into by plaintiff and her husband to live separate and apart. Plaintiff had judgment, from which defendant appeals. The record is here on bill of exceptions.

On April 9, 1891, plaintiff and her husband, H. M. Higgins, entered into an agreement to live separate and apart, and H. agreed therein to pay plaintiff a certain annuity during her life, payment to be in definite installments. By the terms of the agreement the sums agreed to be paid were made a lien on the real estate of H. On April 24, 1895, H. mortgaged his real estate to defendant. On December 1, 1896, he being in default on his contract with plaintiff, she commenced an action to foreclose her lien. Defendant in this action appeared and answered, and by cross-complaint in that action sought the foreclosure of its mortgage. A decree was entered foreclosing defendant's mortgage, and also foreclosing plaintiff's contract for the amount then due thereon. Defendant caused the property to be sold under the decree in its favor, subject to the lien of plaintiff, became the purchaser and obtained a deed prior to the commencement of this present action. The decree in the foreclosure action referred to above was affirmed here on appeal. (*Higgins v. Higgins*, 121 Cal. 487.¹) After the sale to defendant, plaintiff, under the decree, sold a portion of the land described in defendant's mortgage.

On October 6, 1898, plaintiff commenced this action, alleging that there had become due under the terms of the separation contract the sum of eleven hundred and twenty-three dollars and fifty cents, making the bank, as the purchaser subject to her lien, the sole defendant. In the complaint the entire proceedings in the first action are set forth.

¹ 66 Am. St. Rep. 57

1. Appellant made a motion to strike out all this matter as redundant and unnecessary and irrelevant. We find the same difficulty here which has often been pointed out by the court, to wit, failure to identify in the transcript the portions of the pleading referred to in the motion. What was plain enough to the trial judge when the motion was made is obscure and uncertain here, because a reference to the manuscript pleadings, by page and line, does not identify the printed transcript. Conceding, however, that the matter in the complaint and in the supplemental complaint attempted to be referred to was unnecessary, it does not follow that the refusal to strike it out is sufficient ground for reversal of the judgment. The cause was tried upon its merits, and it appears that no substantial right was affected by the ruling of the court. In such case the judgment will not be reversed. (*Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668.) In the cases cited by appellant the rule was correctly stated to be that immaterial matter appearing in a complaint should be stricken out as irrelevant. But the cases cited do not suggest that the refusal of the court to follow this very proper rule is necessarily prejudicial error.

2. Appellant complains that certain findings were unnecessary because they follow certain allegations of the complaint, which are not denied; and it is claimed that these findings were inserted for the same reason that the complaint and supplemental complaint contained unnecessary matter, to wit: "To make it so burdensome upon appellant to appeal that it would be deprived of that resort for the correction of errors." It is true that undenied allegations in the complaint require no findings, as has been often held, but it is not error to make such findings. We cannot assume that the findings complained of were purposely made burdensome from the fact that they were immaterial or unnecessary.

3. It is claimed that the action was unnecessary and contrary to the provisions of section 728 of the Code of Civil Procedure. (Citing *Bank of Napa v. Godfrey*, 77 Cal. 612.) The contention is that there had already been one action on the contract, and plaintiff should have proceeded by motion in action for an order to sell to satisfy the amounts falling in since the first action was brought. Section 728 provides

that where "the debt for which the mortgage, lien, or encumbrance is held is not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease; and afterward, as often as more becomes due, for principal or interest, the court may, on motion, order more to be sold." It was held in *McDougal v. Downey*, 45 Cal. 165, where a mortgage was given to secure the payment of money on a contract not unlike the one here, and the mortgage was foreclosed as to one of the installments that became due, that a second suit could be maintained notwithstanding the former action. The reason given was that the demand for which the second action was brought had not arisen when the first action was commenced; that its amount had never been judicially ascertained, and no relief could be had under the provisions of section 248 of the practice act, which was the same as section 728 of the Code of Civil Procedure. In the Bank of Napa case, relied on by appellant, there was a foreclosure for that part of the principal and interest of the note which at the time had become due; the court in its decree adjudged that there were certain installments of interest to become due at periods stated, and also that the principal would be due at a stated period, and the decree made provision "that hereafter as more shall become due, according to the terms of said note and mortgage, and remain unpaid, the plaintiff may apply to the court for a decree that more of the mortgaged premises be sold to satisfy the same." There was an adjudication of the amounts yet to fall due and provision made in the decree for the plaintiff to apply to the court for further sale of the property. It was held here that the decree was proper, and that the proper practice is in such a case, when further installments of the debt fall due, to file a motion in the case reciting the proceedings therein, alleging that other installments have become due, and asking for a sale of the property. In the case of *Higgins v. Higgins*, *supra*, the court at that trial did not determine that any sums would be due in the future under contract, and no provision was made in the decree for any future sales of property to meet installments yet to become due.

We do not think in such a case the mortgagee is compelled to resort to a motion, under section 728, *supra*, nor, indeed, would it be proper for him to do so. (*McDougal v. Downey, supra.*) But where in the decree provision is made for future sales to enforce payments which the court has in its decree determined will be due in the future, the simpler and less expensive mode of procedure is as provided by section 728, *supra*, and as approved in *Bank of Napa v. Godfrey, supra.* The course pursued in the present action we think the proper practice.

It is advised that the judgment be affirmed.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Van Dyke, J., McFarland, J., Garoutte, J.

[S. F. No. 1398. Department One.—July 18, 1900.]

WALTER H. LINFORTH, Appellant, v. GEORGE E. WHITE et al., Defendants. JAMES M. COSTIGAN, Respondent.

APPEAL—DISMISSAL—SERVICE OF NOTICE—INSUFFICIENT AFFIDAVIT.—

An affidavit of service of the notice of appeal must show a strict compliance with the provisions of the statute; otherwise it is insufficient to establish the fact of service; and in the absence of sufficient proof of the fact of service of the notice, the appeal must be dismissed.

ID.—INSUFFICIENT PROOF OF SERVICE BY MAIL—RESIDENCE OF ATTORNEYS.—

An affidavit of service by mail of the notice of appeal must show that the attorneys for the appellant, whose duty it is to make the service, and the attorneys for the respondent, upon whom it is to be served, reside in different places, between which there is a regular communication by mail; and an affidavit of service by mail made by a third person, which fails to show the residence of the attorneys for the appellant, is insufficient.

MOTION to dismiss an appeal from an order of the Superior Court of Mendocino County setting aside portion of a sale made under a decree of foreclosure. J. M. Mannon, Judge.

The facts are stated in the opinion of the court.

J. Q. White, and George A. Sturtevant, for Appellant.

Seawell & Pemberton, and Barclay Henley, for Respondent.

THE COURT.—Respondent insists that the appeal in this case should be dismissed on the ground that there was no service of the notice of appeal.

The appeal is taken from an order made by the Superior court of Mendocino county, September 21, 1897, setting aside so much of a sale under a decree of foreclosure and sale as embraced the land included in the mortgage of Costigan and not included in the mortgage belonging to Linforth, on the ground that said sale as to such portion was grossly inadequate in price, and was made without the knowledge of Costigan or his attorneys, and without any notice to either. At the hearing of the motion in which said order was entered Costigan, the moving party, was represented by Messrs. Seawell & Pemberton and Barclay Henley as his attorneys, and Linforth, the plaintiff in said action and purchaser at the said sale, was represented by J. Q. White and George A. Sturtevant as his attorneys. Linforth as appellant, and Costigan as respondent, are the parties to this appeal, and have appeared by the same attorneys who represented them in the court below at the hearing of the motion—wherein the order appealed from was entered. The only proof of the attempted service on the respondent of the notice of appeal herein is contained in the following affidavit:

“[Title of Court and Cause.]

“State of California,
“City and County of San Francisco. } ss.

“Lewis W. Martin, having been duly sworn, says: That at all the times hereinafter mentioned I was a white male citizen and resident of the city and county of San Francisco, state of California, over the age of twenty-one years, not a party to or interested in the above-entitled action, and competent to be a witness upon the hearing of any proceeding therein.

“That at the city and county of San Francisco, state of California, on the twentieth day of November, 1897, I personally served the notice of appeal of Walter H. Linforth, as plaintiff,

and Walter H. Linforth, as purchaser, from the order made and entered in said action on the twenty-first day of September, 1897, granting the motion of the defendant Costigan to set aside the sale made by the sheriff on the sixth day of March, 1897, and setting aside said sale, upon Messrs. Seawell & Pemberton, attorneys for the defendant James M. Costigan, by personally depositing in the general postoffice of the United States at San Francisco, California, on said twentieth day of November, 1897, a true and correct copy of said notice of appeal. That said notice of appeal was inclosed in an envelope, with the postage thereon fully prepaid, and said envelope plainly addressed to Messrs. Seawell & Pemberton, attorneys at law, Ukiah, Mendocino county, California, and that at said time the office and residences of said Seawell & Pemberton were at the said town of Ukiah, county and state aforesaid, and that at said time there was a direct and daily communication by mail between the said San Francisco, California, and the said town of Ukiah."

There is nothing in the affidavit showing any connection between affiant and appellant, or the attorneys of the appellant, or for whom, or by whose authority he mailed the letter mentioned in the affidavit.

"An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party or his attorney." (Code Civ. Proc., sec. 940.) Personal service of notice is made as directed in the Code of Civil Procedure, section 1011. Substituted service is made as directed in the sections following. "Service by mail may be made where the person making the service and the person on whom it is to be made reside or have their offices in different places, between which there is a regular communication by mail." "In case of service by mail the notice or other paper must be deposited in the postoffice addressed to the person on whom it is to be served at his office or place of residence, and the postage paid." (Code of Civ. Proc., secs. 1012, 1013.) In this case the respondent, Costigan, had appeared by attorneys, and in such case the notice was required to be served on them. (Code Civ. Proc., sec. 1015.) The affidavit states that the respond-

ent's attorneys, to whom the notice was mailed, resided in Ukiah, Mendocino county. And it does not appear but that appellant and his attorneys also resided there, where the case was tried and the order complained of made and entered; in fact there is nothing to show where appellant or his attorneys resided. Service by mail is good only where the person making the service and the person on whom it is to be made reside in different places, between which there is regular mail communication; and the affidavit of service must show a strict compliance with these provisions of the statute, or otherwise the evidence is insufficient to establish the fact of service.

In *People v. Alameda etc. Co.*, 30 Cal. 182, it is said that the New York statute regulating the mode of serving notice and papers is the same as our practice, and that "the courts of that state have uniformly held that a party relying upon a service by mail, or otherwise than by actual service on the proper person, must show a strict compliance with the requirements of the statute." (Citing a number of cases from that state.)

In *Moore v. Besse*, 35 Cal. 184, the affidavit of service was made by a third party instead of the attorney for the appellant, as here, who mailed the notice at Santa Cruz, directed to respondent's attorney at San Francisco, and the court say that the appellant's attorney, and not the party who mailed the notice, is "the person making the service," and that the fact that he, the attorney, resided there should have been shown by affidavit, under the rule that a party relying upon a substituted service must show a strict compliance with the requirements of the statute. (See also, *Cunningham v. Warnekey*, 61 Cal. 507.)

The appeal must be dismissed, and it is so ordered.

[Sac. No. 614. Department One.—July 18, 1900.]

D. F. DAYTON, Respondent, v. H. L. McALLISTER, Appellant, and IDA A. ZABEL, Respondent.

FORECLOSURE OF MORTGAGE—APPEAL OF JUDGMENT CREDITOR OF MORTGAGOR—PRIOR CONVEYANCE—APPELLANT NOT AGGRIEVED.—In an action to foreclose a mortgage, where the record establishes that a judgment creditor of the mortgagor, made a party defendant, was subsequent in his claim of lien by attachment and judgment to a conveyance made by the mortgagor to his codefendant, and had, therefore, no lien upon the mortgaged premises, he is not aggrieved either by the exclusion of the judgment-roll and attachment papers in his action, nor by the admission of evidence for the plaintiff in support of his claims under the mortgage, and no alleged error therein will be examined upon the appeal of such judgment creditor.

APPEAL from a judgment of the Superior Court of Stanislaus County and from an order denying a new trial. William O. Miner, Judge.

The facts are stated in the opinion of the court.

P. J. Hazen, for Appellant.

T. A. Coldwell, and C. W. Eastin, for Respondent.

HARRISON, J.—Action for the foreclosure of a mortgage. The appellant was made one of the defendants under the allegation that he claimed some interest in the premises, but that his claim is subordinate and subject to the lien of the mortgage. The mortgage was executed to the plaintiff's assignor March 30, 1893, and on March 7, 1894, the mortgagor conveyed the mortgaged premises to the appellant's codefendant, by good and sufficient deed, which was recorded in the office of the county recorder on that day. In his answer herein the appellant sets forth his claim upon the mortgaged land by virtue of the lien of a judgment against the mortgagor, which was entered and docketed February 19, 1895. The court found that the appellant had no lien upon the mortgaged premises, and rendered its decree of foreclosure without making provision for the payment of any portion of the proceeds of the sale to the appellant, and directing that any surplus moneys arising from the sale should be brought into court to

abide the further order of the court. The appellant moved for a new trial, which was denied, and from the judgment and the order denying a new trial he has appealed.

At the trial the appellant offered in evidence the judgment-roll and other papers in the action in which the judgment was rendered, from which it appeared that the action was commenced May 2, 1894, and that the levy of an attachment upon the land described in the mortgage was made therein June 23, 1894. Upon the objection of the plaintiff that this evidence was immaterial, inasmuch as it appeared that the mortgagor had conveyed the land prior to the levy of the attachment, the court excluded the evidence. The appellant also excepted to the admission of certain evidence on the part of the plaintiff tending to show that certain moneys which had been received by the plaintiff's assignor were not received as payment upon the mortgage debt. These rulings are assigned as error upon this appeal.

In the statement of the case on motion for a new trial the appellant does not question the correctness of the finding that the mortgagor had conveyed the land to the other defendant prior to the date at which the writ of attachment in the appellant's suit was levied thereon, and, consequently, the finding that the appellant has no lien upon this land by reason of the judgment which was afterward rendered and docketed in his action against the mortgagor, follows as a legal conclusion. The evidence which he offered in support of his claim to an interest in the premises would not have countervailed or affected this finding of the court, and its exclusion, therefore, was harmless.

As the appellant, therefore, was not interested in the amount for which the plaintiff might recover judgment upon the mortgage debt, the rulings of the court in admitting evidence thereon did not affect his rights, and need not be examined upon this appeal. No objection to these rulings was made by the party interested therein.

The judgment and order are affirmed.

Van Dyke, J., and Garoutte, J., concurred.

Hearing in Bank denied.

[S. F. No. 1348. Department One.—July 18, 1900.]

GEORGE A. WHITEHURST, Respondent, v. FRANCIS
STUART, Appellant.

CORPORATIONS—LIABILITY OF STOCKHOLDER UPON NOTES—PLEADING—

UNCERTAINTY WAIVED BY DEFAULT.—In an action to recover from the defendant as a stockholder in a corporation his proportion of certain unpaid notes executed by the corporation when he was a stockholder, where the complaint alleges that "at and during the times said debts and liabilities were contracted and incurred, the defendant was a stockholder in said corporation," giving the number of shares of stock, and praying judgment for a sum alleged to be "the proportion of said indebtedness for which the defendant is liable to the plaintiff," states a sufficient cause of action to support a judgment by default; and any uncertainty in not alleging with definiteness the times when the corporation incurred the indebtedness for which the notes were given is ground only of special demurrer, which was waived by the default.

ID.—INFERENTIAL AVERMENT ADMITTED BY DEFAULT.—The allegation of the complaint, as made, was an inferential averment that the debts and liabilities of the corporation represented by the notes were contracted and incurred while the defendant was a stockholder therein to the amount alleged. This was a defective statement of a material fact, which, if objected to, might have been cured by amendment of the complaint. Under a denial of the averment, as made, evidence was admissible to prove the truth of such inferential averment, and a default admits its truth.

ID.—CLAIM FOR "PROPORTION OF INDEBTEDNESS."—The averment and prayer for judgment relating to the "proportion of said indebtedness for which the defendant is liable to the plaintiff" indicates a claim for the defendant's proportion of the indebtedness of the corporation evidenced by the notes, and not a claim for recovery upon the notes.

APPEAL from a judgment of the Superior Court of Santa Clara County. A. S. Kittredge, Judge.

The facts are stated in the opinion of the court.

C. D. Wright, for Appellant.

E. E. Cothran, for Respondent.

HARRISON, J.—The plaintiff seeks by this action to recover from the defendant as a stockholder in the Standard Gold & Silver Mining Company, a corporation, a certain sum of money as and for his proportion of the indebtedness of the corporation. Judgment by default for the amount claimed was entered against the defendant, and he has appealed therefrom upon the ground that the complaint fails to state a cause of action against him.

The complaint sets forth the existence of the corporation and the amount of its capital stock, and also sets forth certain promissory notes transferred to the plaintiff, which are alleged to have been executed by the corporation and to be past maturity and unpaid. It alleges that on certain days (naming them) "said corporation for value received, by its officers and agents duly authorized and empowered thereto," made the promissory notes thus set forth. It also alleges "that at and during the times said debts and liabilities were contracted and incurred the defendant was a stockholder in said corporation," giving the number of shares of stock held by him, and asks for judgment for four hundred and ninety dollars, which is alleged to be the "proportion of said indebtedness for which the defendant is liable to the plaintiff." The objections to the complaint urged by the appellant are that it does not appear therefrom that the original indebtedness of the corporation was created at the times when the notes were executed, and that the notes may have been given for an indebtedness created prior to the time when the defendant became a stockholder in the corporation.

It may be conceded that the complaint is open to the objection of uncertainty in failing to allege with definiteness the times when the corporation incurred the indebtedness for which the notes were given, and, if a special demurrer had been interposed upon that ground, it should have been sustained; but this objection was waived by failing to so present it. The allegation that "at the times said debts and liabilities were contracted and incurred defendant was a stockholder in said corporation" is an inferential averment that the debts and liabilities of the corporation represented by the promissory notes were contracted and incurred while the defendant

was a stockholder therein to the amount alleged. This is a defective statement of a material fact, and for that reason was subject to special demurrer, but it cannot be held that there is an entire absence of an allegation of such fact. If this objection had been made, it might have been cured by an amendment to the complaint. (*Hill v. Haskin*, 51 Cal. 175; *Cushing v. Pires*, 124 Cal. 663.) The corporation incurred a liability at the times when the notes were given, and its indebtedness may have been incurred at those times. (*Knowles v. Sandercock*, 107 Cal. 629; *Case Plow Works v. Montgomery*, 115 Cal. 380.) Under a general denial to a complaint in this form, evidence in support of this fact, if received without objection, as well as a finding thereon, would be sufficiently within the issues to support a judgment in favor of the plaintiff. The same result follows a judgment rendered upon a default of the defendant by reason of his failure to appear and answer the complaint.

The subsequent averment of "the proportion of said indebtedness for which the defendant is liable to the plaintiff" indicates that the pleader was seeking to establish the liability of the defendant for his proportion of the indebtedness of the corporation represented by the notes, and not a recovery upon the promissory notes.

The judgment is affirmed.

Van Dyke, J., and Garoutte, J., concurred.

Hearing in Bank denied.

[S. F. Nos. 1343, 2213. Department One.—July 18, 1900.]

J. F. COONAN, Respondent, v. J. LOEWENTHAL, Appellant.

PLEADINGS—AMENDMENT OF COMPLAINT AT TRIAL—CHANGES MADE IN ORIGINAL COMPLAINT—CONSENT OF COUNSEL.—Where the complaint was allowed to be amended at the trial, which was made by oral consent of the defendant's counsel in presence of the court, by changing a figure in the original complaint, so as to increase the amount of money sued for in one count of the complaint, and amending the prayer accordingly, it being agreed that the answer should stand as the answer to the complaint as amended, the defendant is bound by such consent and cannot afterward object to the regularity of the amendment.

ID.—REPRESENTATION OF CLIENT BY ATTORNEY—WORDS AND ACTIONS IN PRESENCE OF COURT.—Where a party appears by attorney, the attorney has the control and management of the cause, and his words and actions in the presence of the court concerning the trial of the cause are the same as though said and done by the party himself.

ID.—CODE RULE AS TO STIPULATION—ORAL CONSENT TO ACT PERFORMED—FRAUD NOT PERMITTED.—Where oral consent in the presence of the court has been given by the counsel of one party to an act fully performed by opposing counsel, the power given to the attorney to bind his client by stipulation made under section 283 of the Code of Civil Procedure cannot be invoked as intended to work a fraud upon the opposite party.

ID.—MOTION TO CORRECT RECORD PENDING APPEAL—RESCISSION OF AMENDMENT.—A motion made by a substituted attorney of the defendant pending his appeal, to correct the record by striking out from the complaint the words and figures allowed to be inserted therein at the trial by consent of defendant's former attorney given in open court, is in effect to rescind the former action of the court in allowing the amendment, to the prejudice of the plaintiff, without fault on his part being shown, and is properly denied.

ID.—REVIEW UPON APPEAL—INSUFFICIENCY OF EVIDENCE.—Where an appeal from the judgment is taken more than sixty days after the entry of the judgment, the question whether the evidence is insufficient to support the judgment cannot be considered upon such appeal; and where the ground of insufficiency of the evidence was not urged or considered on the hearing of the motion for a new trial, the review upon appeal from the order denying the new trial will be confined to the errors urged and considered by the court below.

ID.—ACTION BY ATTORNEY FOR SERVICES—EVIDENCE—CROSS-EXAMINATION OF PLAINTIFF.—In an action by an attorney for services ren-

dered to the defendant, where the plaintiff had given no testimony in chief upon the first count of his complaint, the defendant may properly be refused the privilege of cross-examination thereupon, in reference to matters not appearing to be material to the case.

ID.—ADMISSION OF DOCUMENTARY EVIDENCE—PREJUDICE NOT SHOWN IN RECORD.—Evidence of a contract between the defendant and trustees for his creditors, admitted for the plaintiff, is not shown to be prejudicial where the contract is not set out in the record nor its contents or materiality shown therein.

ID.—VALUE OF SERVICES—EXPERT EVIDENCE—BASIS FOR HYPOTHETICAL QUESTIONS—QUESTIONS FOR JURY.—Expert evidence of attorneys as to the value of the professional services rendered by the plaintiff as attorney for the defendant may be properly admitted in answer to hypothetical questions based upon the admitted allegations of the complaint, and the evidence given for the plaintiff. Whether the evidence for the plaintiff is true is a question for the jury to determine.

APPEAL from a judgment of the Superior Court of Humboldt County and from an order denying a new trial. E. W. Wilson, Judge.

The facts are stated in the opinion of the court.

J. W. Turner, and Chamberlin & Wheeler, for Appellant.

S. M. Buck, Buck & Cutler, and J. F. Coonan, for Respondent.

VAN DYKE, J.—On the trial of the main case (S. F. No. 1343) plaintiff's counsel asked leave of the court to amend his complaint in certain particulars, and, there being no objection, the court allowed the amendment to be made. The amendment consisted in changing one to four in the second count, so that the claim for services would be four thousand seven hundred and fifty dollars, instead of seventeen hundred and fifty dollars, and the prayer of the complaint was also amended to correspond with such change. The amendment was made on the original complaint on file, by writing over the former words and figures the substituted words and figures. The trial of said action resulted in a verdict for the plaintiff in the sum of five thousand dollars. A motion for a new trial was made on a bill of exceptions, which mo-

tion was denied. Thereupon the defendant appealed from the judgment and order denying a new trial. The transcript on said appeal was filed in this court March 2, 1898, and thereafter in due course the opening brief on the part of the appellant and the brief of the respondent were filed, and the reply brief of appellant was filed May 31, 1898. Up to this time the defendant and appellant had been represented by Chamberlin and Wheeler as his attorneys. In October, 1898, additional points and authorities were filed on the part of the appellant, who was then represented by J. W. Turner in place of his former attorneys. Thereafter, while the case was still pending here, in December, 1899, the defendant and appellant, through his substituted attorney Mr. Turner, moved the court below to correct the record by striking out the words and figures inserted by way of amendment in the original complaint, and restore the former words and figures, on the ground that the said amendment was not properly authorized. The court below denied the motion to amend and correct the record, and from that order the defendant took an appeal, being case No. 2213. On the hearing of the motion to amend the record it appeared, both from the rough minutes, and as entered into the book of permanent minutes, that by consent plaintiff was granted leave to amend his complaint herein by inserting the word "four" in lieu of "one" on page 3 of said complaint after word "of"; also, by inserting the figure "4" in lieu of "1" after the word "dollars." Mr. Buck, one of plaintiff's attorneys, also testified that he called Mr. Chamberlin's attention to the fact that he desired to make the amendment, and when they came into court, and before the trial commenced, he asked leave of the court to make such amendment, and that he then made the amendments and showed them to Mr. Chamberlin, and he consented to them, and that the motion was granted with his consent.

A mere statement of the case would seem to dispose of this appeal. However, appellant's counsel presses the matter with such earnestness as to require, perhaps, some notice of his contention. It is a common occurrence for trial court to allow pleadings to be amended both before and during the trial of a cause, on the consent of the opposite party, or without such consent on a proper showing, where it can be

done without material prejudice to the other side. Such practice may and generally does facilitate the disposition of business. In this case to have continued the trial to allow the complaint as amended to be engrossed and copied, served on the adverse party, with time allowed to file an amended answer thereto, would have served no useful purpose. The amendment could as well be made then and there on the original complaint, and the answer on file stand as the answer to the complaint as amended, and the trial proceed, as was done. This being so, it is too late for the party who consented to the amendment, or made no objection thereto, to raise any question as to its regularity. A party may appear in person or by attorney, but when he appears by attorney the latter, while acting as such, has control and management of the case, and his sayings and doings in the presence of the court concerning the trial of the cause are the same as though said and done by the party himself. (*Board of Commrs. v. Younger*, 29 Cal. 149¹; *Mott v. Foster*, 45 Cal. 72; *Wylie v. Sierra Gold Co.*, 120 Cal. 486; *Crescent Canal Co. v. Montgomery*, 124 Cal. 135.) Conceding, as claimed by appellant's attorney, that the provisions of the code as to the mode in which an attorney may bind his client by stipulation (Code Civ. Proc., sec. 283) are like the statute of frauds, still that does not aid him. Where by the statute of frauds certain contracts are declared void unless in writing, it has always been held that performance, or even part performance, of the agreement takes the case out of the operation of the statute. Otherwise, as said, instead of the statute being one to prevent frauds, it would afford the means for perpetrating frauds. After the trial and judgment, and pending an appeal from such judgment, and order denying a new trial, the court below very properly refused to grant the motion in question, which in effect would have been to rescind its former action to the prejudice of plaintiff, without fault on his part being shown. (See *Smith v. Whittier*, 95 Cal. 279.)

In case No. 1343 the appeal is taken from the judgment and order denying a new trial, and both cases were argued and submitted together.

¹ 87 Am. Dec. 164.

The appeal having been taken more than sixty days after the entry of judgment, the question whether the evidence is sufficient to support the verdict cannot be reviewed on such appeal from the judgment. (Code Civ. Proc., sec. 939.) The appeal from the order denying a new trial presents very few questions. The motion was based on two grounds only, to wit, errors of law occurring at the trial, and that the evidence did not sustain the verdict. On the hearing of the motion, however, only the questions of errors of law occurring at the trial were urged or considered by the court below. Among the assigned errors are:

1. That the defendant was not allowed to cross-examine the plaintiff while on the stand. Defendant's counsel called the attention of the plaintiff on cross-examination to an exhibit in reference to his charge for services in *Loewenthal v. Robinson*, and was interrupted by the judge, who asked whether he proposed to interrogate the witness in regard to that, whereupon defendant's attorney stated what he proposed to ask the plaintiff, which offer the court denied, "upon the ground that the plaintiff in this case has offered no evidence whatever upon the first count of that complaint. There is, therefore, nothing before the court in relation to that count or those items; but, however, when you reach your defense, if those items are involved in what you term to be an open, mutual, and current account, it would then become competent." It does not appear that the question sought to be asked the witness on cross-examination related to matters on which he had testified in chief, or that the matter sought was at all material, and therefore the defendant's right of cross-examination was not, as he claims, prejudiced.

2. Appellant further contends that the court erred in permitting plaintiff while on the stand as a witness to produce and read, over the objection of defendant, his former client, a certain contract or agreement with Hyman & Weil, trustees for creditors; but the agreement is not set out in the record, nor is there anything to show what its contents were, or that it was in any way material. If it were conceded, therefore, which it is not, that errors occurred in the respects above noticed, the court would not be justified in disturbing the

judgment on that ground, inasmuch as it does not appear that they were prejudicial errors, or that the appellant has sustained any injury therefrom. (Code Civ. Proc., sec. 475.)

3. The action was for professional services as an attorney, and on the trial the plaintiff, to prove the value of his services, called as expert witnesses a number of members of the bar, and put to them certain hypothetical questions as a basis from which to estimate the value of such services. These questions assumed certain facts, and the questions were similar as put to each of the witnesses. The following is given in appellant's brief as a sample of the questions propounded to said witnesses: "Suppose that defendant was carrying a stock of goods of over one hundred thousand dollars and was financially embarrassed, having liabilities of about sixty thousand dollars, and but little ready money, and had employed plaintiff as his legal adviser, with constant daily communications between them, by the way of advice, drawing papers, etc., for about thirteen months, and by such labors saved defendant thirty thousand dollars to fifty thousand dollars; suppose that at the end of those thirteen months defendant should have reached a position where his indebtedness had been reduced forty-eight thousand dollars, and his stock amounted to seventy thousand dollars, and he was comparatively easy and worth fifty thousand dollars as the result of plaintiff's labors." Appellant's contention is quite correct that hypothetical questions should be based upon the testimony of witnesses or other competent testimony tending to prove a fact; that every hypothesis contained in the question should have some evidence to sustain it. The record, however, shows that the conditions required as the basis of the questions existed in this case. It is averred in the complaint that the defendant on September 1, 1894, was engaged in carrying a stock of over one hundred thousand dollars, with stores at Eureka, Arcata, and Ferndale, in Humboldt county, which is not denied by the answer. It is also averred in the complaint, and not denied in the answer, that on said date the defendant had liabilities of sixty thousand dollars and but little ready money. It is also averred and not denied, but admitted in the answer, that from September 1, 1894, to September 29, 1895, the plaintiff was employed as a legal

adviser of the defendant. It is further averred in the complaint that as such attorney plaintiff acted for thirteen months, holding daily consultations and giving advice, and drawing up legal documents, and that he went to San Francisco for and constantly guided the defendant. It is denied by the defendant that his services were daily or constantly rendered, or to the degree and amount stated in the complaint. But evidence was introduced before the hypothetical questions were propounded tending to support the allegations of the complaint in this respect. It is averred in the complaint that the services of the plaintiff for the defendant resulted in saving to the defendant nearly fifty thousand dollars. The answer does not deny the saving of the fifty thousand dollars, but denies that it was effected by the plaintiff's services. The answer admits that the defendant was financially embarrassed, and it was in evidence that he considered himself a ruined man in October, 1894. The testimony in at the time tended to show that the plaintiff was the sole guide and adviser of the defendant in the different moves made to save him; that from the condition of insolvency within the period of thirteen months he had become solvent, and had some seventy thousand dollars of assets and only ten thousand dollars of debts; and the plaintiff had testified that it was through his exertions and efforts that this favorable change had been brought about. Whether this was so or not was a question for the jury to determine, but the evidence in, with the admissions in the pleadings, were sufficient as a basis for the hypothetical questions.

These are the only material errors assigned and relied upon by appellant's counsel on appeal.

The order refusing to correct the record (case No. 2213) is affirmed. The judgment and order denying a new trial in the main case (No. 1343) are also affirmed.

Harrison, J., and Garoutte, J., concurred.

[S. F. No. 1275. Department Two.—July 18, 1900.]

BERTHA MEYER, Appellant, v. A. W. BISHOP et al., Respondents.

CORPORATION—MUTUAL ENDOWMENT ASSOCIATION—ACTION BY MEMBER AGAINST DIRECTORS—RECOVERY BACK OF PAYMENTS—ASSENT TO RULES.—One who has voluntarily made payments under a certificate of membership in a mutual endowment association, which assumed to be and was doing business in the style of a corporation and which had passed through the regular form of incorporation, and had elected directors and adopted by-laws, is bound by his own acts and by the articles of association and by-laws to which he had assented before the payments were made; and cannot maintain an action against the directors individually, based upon an alleged failure to incorporate, to recover back the moneys which were regularly paid in and out under the articles of association and by-laws, with full knowledge of the plaintiff as to the disposition required thereby to be made of such moneys by the directors.

ID.—FAILURE OF SCHEME—PAYMENT TO CHOSEN AGENTS—MONEY HAD AND RECEIVED—PERSONS IN PARI DELICTO.—The members of such an association, who have continued for years to pay to their chosen agents money to be expended in a specified way, cannot after the failure of the scheme, sue their chosen agents in an action for money had and received to recover back the sums so paid. They are in *pari delicto*, and must share the loss.

ID.—DISCONTINUANCE OF BUSINESS BY DIRECTORS.—A suggestion that the defendant directors discontinued the business without sufficient cause cannot avail the plaintiff in an action to recover back moneys paid to them upon the alleged ground that there was no incorporation, which is not based upon any charge that such moneys were wasted or misappropriated by the defendants, and in which no damages are claimed for the improper discharge of the duties of their express trust as directors, but in which they are only sought to be charged as involuntary trustees of money had and received from the plaintiff.

ID.—CASE AFFIRMED AND APPLIED.—The case of *Perkins v. Fish*, 121 Cal. 317, affirmed and applied as being on all fours with the present case.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

T. C. Spelling, for Appellant.

The articles of association and by-laws of the association purported to be a contract of life insurance, which was in violation of law and void, and estops neither party to show its invalidity. (*Spare v. Home Ben. Ins. Co.*, 8 Saw. 618; 15 Fed. Rep. 707; *In re Comstock*, 3 Saw. 228; Bacon on Benefit Societies and Life Insurance, 2d ed., secs. 51-53; *Farmer v. State*, 69 Tex. 561; 16 Am. & Eng. Ency. of Law, 33; *Commonwealth v. Wetherbee*, 105 Mass. 149; *State v. Critchett*, 37 Minn. 13; *State v. Farmers' etc. Ben. Assn.*, 18 Neb. 276, 281; *State v. Citizens' Ben. Assn.*, 6 Mo. App. 163; *State v. Merchants' etc. Soc.*, 72 Mo. 146; *People v. Nelson*, 46 N. Y. 477; *State v. Standard Life Assn.*, 38 Ohio St. 281.) When the articles conflict with the act under which corporate existence is claimed, the act must prevail, and no corporate existence is shown. (*Republican etc. Mines v. Brown*, 58 Fed. Rep. 644; affirmed, 1 C. C. A. 412.) To form a benevolent corporation a benevolent object must be clearly stated. (*People v. Rice*, 68 Hun, 24; *State v. International Inv. Co.*, 88 Wis. 512¹; *State v. Critchett*, *supra*; *In re Nether*, 2 Penn. Dist. Rep. 702.) The purpose stated being illegal, there is an entire failure to incorporate, and an entire absence of basis for the claim of a *de facto* corporation. (Morawetz on Private Corporations, sec. 758; *Gent v. Manufacturers' etc. Ins. Co.*, 107 Ill. 658; *Kaiser v. Lawrence Sav. Bank*, 56 Iowa, 106²; *Evenson v. Ellingson*, 67 Wis. 634, 646; *Farmers' etc. Trust Co. v. Floyd*, 47 Ohio St. 525.³) The transactions were *malu prohibita* and not *malum in se*, and the parties were not, therefore, *in pari delicto*. (*Martin v. Wade*, 37 Cal. 174, 175; Pomeroy on Contracts, sec. 287; *Tracy v. Talmage*, 14 N. Y. 162⁴; *White v. Bank*, 22 Pick. 189; 2 Parsons on Contracts, 6th ed., bot. p. 910, star pp. 746, 747, and notes; *Richardson v. Willats*, L. R. 8 Ex. 69.) In such a case as this the statutory prohibition is directed against the insurer, and not against the insured. (*Tracy v. Talmage*, *supra*; *White v. Bank*, *supra*.) The corporation was a legal fraud, and money

¹ 43 Am. St. Rep. 920.² 41 Am. Rep. 85.³ 21 Am. St. Rep. 846.⁴ 67 Am. Dec. 132.

paid to it through its instrumentality may be recovered back. (*McGrew v. City Produce Exchange*, 85 Tenn. 572.)

Davis & Hill, and F. W. Sawyer, for Respondents.

The mutual benefit and aid purposes of the corporation did not require stock, and made the corporation valid as a corporation, whether other purposes were invalid or not. (*Albright v. Lafayette etc. Assn.*, 102 Pa. St. 411.) There was a corporation *de facto*. (Civ. Code, sec. 358; *Martin v. Deetz*, 102 Cal. 65, 66⁵; *First Baptist Church v. Branham*, 90 Cal. 23.) Plaintiff who contracted with the corporation for its benefits as a member cannot deny its existence. (Thompson on Corporations, sec. 518; *Northampton County's Appeal*, 30 Pa. St. 305; *Snider's Sons Co. v. Troy*, 91 Ala. 224.⁶)

TEMPLE, J.—This case seems to be on all fours with *Perkins v. Fish*, 121 Cal. 317. Plaintiff held a certificate of membership in the Mutual Endowment Association, which assumed to be and was doing business in the style of a corporation. The association went through the form of incorporation, and the defendants, who were its directors, still contend that it was a corporation *de jure* and *de facto*. Articles of incorporation were executed in due form and were filed in the clerk's office of the county and in the office of the secretary of state. A board of directors was elected and elaborate by-laws adopted. They provided, for its members only, endowment, insurance, and disability benefits, and also for assessments, with elaborate and minute provision for the disposition and management of the funds of the association. This action is not based upon any charge that the moneys have been wasted or misappropriated, but solely upon the proposition that there was a complete failure to incorporate, and the association was not even a corporation *de facto*, and, therefore, there was no authority on the part of defendants, claiming to act as trustees or directors of a corporation, to receive the money. But the payments were voluntary and made with full knowledge as to the disposition authorized and required by the by-laws. To quote from *Perkins v. Fish*, *supra*: "It [the money] was paid in and out under articles of associa-

⁵ 41 Am. St. Rep. 151.

⁶ 24 Am. St. Rep. 887, 891, 892.

tion and rules and regulations framed by plaintiff and other members, or assented to by them in advance of any payment by them, and they must be held to be bound by their own acts." The members, therefore, who have continued for years to pay their chosen agents money, to be expended in a specified way, cannot after the failure of the scheme sue their agents, in an action for money had and received, to recover back the sums so paid. They are *in pari delicto* and must share the loss. As to persons who were not members different questions would be presented. Conceding all that plaintiff contends for, the purposes of the association were not improper, but the mode adopted for their attainment was unauthorized. They were all in it together, and it is difficult to see why, after failure, one set of members should recover from another set, payments which they have made in the futile attempt.

Counsel for appellant in his oral argument attempted to differentiate this case from the case of *Perkins v. Fish*, *supra*, but we are unable to see any distinction affecting the vital point.

It is suggested that the defendants discontinued the business without sufficient cause. The proposition sounds very strange coming from the plaintiff, but this action is not for damages for the improper discharge of the duties of their trust on the part of defendants. If it can be said that defendants are sued as trustees, it is an involuntary trust which is being forced upon them.

There are eighty-two counts in the complaint, stating as many different causes of action, accruing to plaintiff and eighty-one others who had assigned their claims to plaintiff. They are all alike. Each assignor was a member of the association and the demand of each is for money paid out upon a contract which it is alleged was void because the association was not a corporation *de jure* or *de facto*, and the business which the association attempted was unauthorized.

The judgment is affirmed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[S. F. No. 2027. In Bank.—July 18, 1900.]

MAY B. CURTIS, Respondent, v. GEORGIANA L. SCHELL, Executrix, etc., et al., Appellants.

ESTATES OF DECEASED PERSONS—FAMILY ALLOWANCE FOR PAST YEARS—SALE OF REALTY—SUPPRESSO VERI—ACTION BY HOLDER OF MORTGAGES—EQUITABLE RELIEF.—In a proceeding in equity brought by the holder of mortgages upon the interest of the widow in the estate of her deceased husband, given to secure money advanced for the support of the widow, to set aside a subsequent order granting her a family allowance (which appears to have been made entirely out of the ordinary course, in the sum of thirty thousand dollars, to cover past maintenance for nineteen years, upon an application of the widow in which the facts as to the unpaid mortgages were suppressed from the court of probate), and to set aside an order of sale of realty to pay such allowance, and for general relief, the court of equity, upon finding the facts, may direct as equitable relief that the proceeds of the sale made under the direction of the court of probate to pay the allowance, shall be applied first toward the payment and satisfaction of the mortgages, before any payment is to be made to the widow.

ID.—RIGHTS OF TRANSFEREE—PRESUMPTION OF KNOWLEDGE OF LAW—NOTICE—UNUSUAL PROCEDURE.—One to whom the title of an heir of the estate is transferred or mortgaged as a rule takes only so much of the distributive share of such heir as remains after the purposes and objects of administration have been satisfied, and is presumed to know the law, but is not presumed to anticipate or have notice of any unusual or extraordinary proceeding taken under the form or guise of law.

ID.—MORTGAGEES NOT CHARGEABLE WITH NOTICE OF UNUSUAL APPLICATION.—The mortgagees of the widow, who advanced money to support the family, are not chargeable with notice of the subsequent unusual application by the widow for a family allowance made to cover many past years, after the estate is ready for distribution and the children had ceased to be a charge upon the widow, and for a sale of the realty to pay such allowance.

ID.—SUPPRESSION OF MATERIAL FACTS—FRAUD UPON HOLDER OF MORTGAGES.—The failure of the widow in her application for a family allowance to notify the court of the existence and nonpayment of the mortgages for money borrowed for the support of the family was the suppression of a material fact, which operated as a fraud upon the holder of the mortgages. To give the widow, under the name of a family allowance, the proceeds of a sale of the same property on which she had borrowed money to support the family, would be to pervert the law designed for a beneficent

purpose into an instrument for the perpetration of a gross fraud.

ID.—FRAUD UPON COURT EXTRINSIC TO APPLICATION.—The suppression of such material facts was also a fraud committed upon the court in a matter extrinsic and collateral to the question examined on the application for a family allowance, against which equity will relieve.

ID.—JURISDICTION OF EQUITY TO RELIEVE FROM FRAUD IN COURT OF PROBATE.—The court of probate is of special and limited jurisdiction, and has not the requisite machinery to try a question of fraud committed therein against the rights of interested parties; and it is the peculiar province of a court of equity to grant relief from such fraud at the instance of the aggrieved parties, who have no adequate remedy in the court of probate.

ID.—FINALITY OF ORDERS OF PROBATE COURT—CONTROL IN EQUITY OF PROCEEDS OF SALE.—Where the orders of the court of probate authorizing the family allowance, and directing the sale of the real estate have become final, in the exercise of the probate jurisdiction, and there is no remedy therefor by appeal, equity will give adequate relief against the enforcement of the final judgment of the probate court which was procured by fraud of the widow, by directing a proper application of the proceeds of the sale made thereunder in payment of the mortgages made by her.

ID.—JURISDICTION OF COURT OF PROBATE—RIGHTS OF STRANGERS.—It is not within the jurisdiction of the court of probate to determine the rights of strangers to the estate, or to bring them in for the purpose of determining their rights to the proceeds of a sale made under its order for the benefit of the applicant therefor; and for the want of such jurisdiction, the equity jurisdiction is properly invoked to determine their rights to such proceeds.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a motion to vacate the judgment for the plaintiff and to enter a judgment for the defendants. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Fisher Ames, for Appellants.

The court had jurisdiction to order the family allowance, and sell the real estate to pay it. (Code Civ. Proc., secs. 1466, 1536-47; *In re Lux*, 100 Cal. 593-96, 603; *In re Welch*, 106 Cal. 427, 432, 433; *Estate of Walkerley*, 77 Cal. 642; *Sawyer v. Sawyer*, 28 Vt. 245.) If an heir conveys his interest in the

estate of his ancestor, he conveys such interest only as will remain to him after satisfying the objects of administration. (*Estate of Moore*, 57 Cal. 437, 442, 447; *Cook v. De La Guerra*, 24 Cal. 237.) Notice having been given of the application to sell the real estate to pay the allowance, the whole world, including the plaintiff, is bound by the decree. (*Williams v. Marx*, 124 Cal. 22.) Equity will not relieve, where it does not appear why remedies at law were not exhausted. (*Eldred v. White*, 102 Cal. 600; *Heller v. Dyerville Mfg. Co.*, 116 Cal. 128; *Ketchum v. Crippen*, 37 Cal. 223; *Collins v. Townsend*, 58 Cal. 614.) The fraud, if any, was intrinsic to the merits, and could not be ground for the relief. No extrinsic fraud is found. (*Pico v. Cohn*, 91 Cal. 129¹; *United States v. Throckmorton*, 98 U. S. 61; *Bergin v. Haight*, 99 Cal. 52; *Fealey v. Fealey*, 104 Cal. 354-69²; *Langdon v. Blackburn*, 109 Cal. 19-27; *Hanley v. Hanley*, 114 Cal. 690.)

Gordon & Young, for Respondent.

Equity will afford relief against the enforcement of a judgment which is against conscience. (*Bergin v. Haight*, 99 Cal. 52; *Leach v. Pierce*, 93 Cal. 618; *Dunlap v. Steere*, 92 Cal. 346³; *Young v. Sigler*, 48 Fed. Rep. 182; *Arrowsmith v. Gleason*, 129 U. S. 86, 101; *Marshall v. Holmes*, 141 U. S. 601.) The widow is estopped by her mortgages from acting contrary thereto. (*Bates v. Bates*, 97 Mass. 392; cited in *Estate of Moore*, 57 Cal. 437, 447; *Fletcher v. Peck*, 6 Cranch, 87; *Bond v. Bond*, 7 Allen, 1.) The right to a family allowance may be waived. (*In re Welch*, 106 Cal. 427, 433; *Kearns' Appeal*, 120 Pa. St. 523.) The fraud was extrinsic and collateral to the application for a family allowance; and a court of equity has jurisdiction. (*Wickersham v. Comerford*, 96 Cal. 439; *Dunlap v. Steere*, *supra*.) The court had jurisdiction to grant the relief given, which was consistent with the case made. (Pomeroy on Remedies, secs. 83, 530; *Zellerbach v. Allenberg*, 99 Cal. 68; *Hurlbutt v. Spaulding*, 93 Cal. 55.)

¹ 25 Am. St. Rep. 159.

² 43 Am. St. Rep. 111.

³ 27 Am. St. Rep. 143.

VAN DYKE, J.—This is a proceeding in equity to set aside an order granting a family allowance in the matter of the estate of Theodore L. Schell, deceased, and an order authorizing the sale of the real property of said estate for the purpose of paying said family allowance, and for general relief.

From the facts found the court, as a conclusion of law, held that the mortgages given to secure the indebtedness held by the plaintiff were a lien upon the interest of the defendant Georgiana L. Schell in and to the real estate of the estate of said Theodore L. Schell, and that said interest of defendant Georgiana L. Schell as an heir at law, legatee, and devisee of said Theodore L. Schell in the proceeds of the sale of said real estate should be applied to the payment and satisfaction of said borrowed money so secured by said mortgages, before the payment of said family allowance, and a decree was entered accordingly. This appeal is taken from the judgment and decree so entered, and from an order made and entered denying the motion of the defendants to set aside and vacate said judgment, and is based upon questions of law alone.

It is contended on the part of the appellants that the conclusions of law are not justified by the facts found; that there is no finding of fraud in procuring the order for a family allowance, or the order of sale to pay the same; that, failing to find fraud or to set aside the orders of the probate court, the jurisdiction of a court of equity was at an end, and the court, therefore, could not control or direct the application of the proceeds of the sale. A history of the case may be necessary to a proper understanding of the questions involved.

Theodore L. Schell died at the city and county of San Francisco, December, 1877, leaving a will by which the defendant, Georgiana L. Schell and one William Hale were appointed executors. In June, 1886, Hale resigned as executor, and since that date the defendant, Georgiana L. Schell, has continued to administer the estate solely as the executrix of the said last will. By the terms of the will one-third of the estate was devised to said defendant Georgiana L. Schell, the widow of the said decedent, and the remaining two-thirds to his six children—the youngest of whom, a son, was at the time of his death, two years old. It was provided in the will that the estate should remain intact and undistributed un-

til the youngest son should attain the age of twenty-one; and in the meantime the income of the real estate should be paid to said widow for the support and maintenance of herself and children. The youngest son became of age December, 1896. The income from the estate, after the expenses of managing the same, not being sufficient to support the family, the widow from time to time borrowed money for such purpose, mingling the said moneys so borrowed with the moneys received by her as income from the said estate, and using the same for the family support. To secure the money so borrowed she executed mortgages to the parties loaning the same of all her right, title, interest, and estate as an heir at law, devisee, and legatee in and to the real estate of said estate. The first of the mortgages so executed was to the Bank of Sonoma County in April, 1883, and was given to secure the sum of five thousand six hundred dollars, with interest. The second was executed November, 1887, to Lewis F. Curtis, to secure the payment of the sum of three thousand dollars, with interest. These two mortgages covered lands belonging to said estate in Sonoma county. In November, 1887, she executed two other mortgages to said Lewis F. Curtis, one to secure the sum of two thousand eight hundred dollars, and the other the sum of twelve hundred dollars, with interest on each at the rate of eight per cent per annum, on certain real estate belonging to said estate in the city and county of San Francisco. The mortgage held by the Bank of Sonoma County was foreclosed, and the interest covered by the same sold thereunder, which interest has become vested in the plaintiff. The other mortgages by proper assignment and transfer have also become vested in the plaintiff. Two of the children having died their interest under the will became vested in their mother, the defendant, Georgiana L. Schell. On December 14, 1896, on the petition of the said Georgiana L. Schell, the probate court of the city and county of San Francisco, in which the estate was being administered, granted an order for family allowance in the sum of one hundred and fifty dollars a month, running back to the first of January, 1880, aggregating, as stated in the findings, the sum of about thirty thousand dollars. Thereafter on the 23d of April, 1897, said probate court made and entered an order

to sell the real estate of said decedent to pay said family allowance and expenses of administration; and it is found that said order was based upon the claim made by said executrix that there was then due the sum of thirty-six thousand dollars for expenses of administration and for said family allowance, and there was no personal property remaining in the hands of the said executrix wherewith to pay the same. The value of the whole of the property of the said estate in December of that year was appraised at forty-four thousand three hundred and ninety-six dollars.

As above shown, the decedent directed by his will that all the income of the estate should belong to the widow for the purpose, among other things, of providing family support; but said income, it appears, did not afford sufficient means for the support of the family, and hence the widow, instead of obtaining an order of court for the sale of the property of the estate to provide for family support, borrowed money from time to time, and used such money, as found by the court, for the purpose of supporting the family. This state of things continued about nineteen years, and until after the youngest of the children had attained majority. The mortgages to secure the money borrowed, as already appears, were executed by Georgiana L. Schell on her interest as devisee, legatee, and heir at law of Theodore L. Schell, deceased.

The rule of law is as claimed by the appellant, that one to whom the title or interest of an heir at law is transferred pending administration takes only so much of the distributive share belonging to said heir as remains after the purposes and objects of administration have been satisfied. It is therefore claimed that the mortgagee who loaned money in this case did so presumably knowing the law. Although a party is presumed to know the law, he is not presumed to anticipate any unusual or extraordinary proceeding taken under the form or guise of law. Family allowance in the administration of an estate is generally for a temporary purpose, and the settlement of an estate and the distribution of the same to the parties entitled thereto generally takes place within a reasonable period. Certainly, no one would be bound to take notice that an application for a family allowance would be made, as in this case, after all the children had

ceased to be a charge upon the widow, and after the estate was ready for distribution under the terms of the will, and in view of the fact that the money loaned was for the purpose of supporting the family, and presumably in view of avoiding the necessity of selling the estate to provide a family allowance. The application for family allowance was, therefore, not in the ordinary course of procedure. Upon the hearing of the petition for family allowance, although it was stated that the petitioner had borrowed money from divers persons for the support and maintenance of herself and family, it was not stated that these sums had not been paid, and it is found "the court was not informed, and at the time of making said order for said family allowance had no notice or knowledge that the said defendant, Georgiana L. Schell, had made and executed the mortgages mentioned." This was the suppression of a very material fact, which ought to have been brought to the knowledge of the court. The amount of debts, exclusive of these mortgages, and including the family allowance, as shown by the finding, was some thirty-six thousand dollars, and the value of the whole property, as also found, was forty-four thousand three hundred and ninety-six dollars. Deducting the expenses, including the family allowance, from the whole value of the property, would leave only a little over eight thousand dollars. The widow held a five-ninths interest in this, which would be less than five thousand dollars. The amount secured by mortgages which were a subsisting lien upon the interest of the petitioner with accumulated interest aggregated from twenty thousand to twenty-five thousand dollars. Therefore, if the scheme inaugurated on behalf of the petitioner should be carried out by a sale of the entire property for the payment of the said family allowance and the expenses of administration, there would be less than five thousand dollars remaining of the interest belonging to her with which to discharge the indebtedness due the plaintiff, leaving nearly twenty thousand dollars unpaid. The case here is different from that of simply buying the interest of an heir, in which, of course, the purchaser takes what is left upon distribution, after the settlement of the estate, including the charges and expenses of administration. Here, as already appears, the money was advanced for

the purpose of supporting the family. It was in lieu of a family allowance, and it was loaned not to an heir merely, but to the sole executrix of the estate, who is a trustee to protect the interests of creditors. (*Bergin v. Haight*, 99 Cal. 52.)

To give the appellant, under the name of family allowance, the proceeds of a sale of the same property on which she had borrowed money to support the family, would be to pervert the law, designed for a beneficent purpose, into an instrument for the perpetration of a gross fraud. It is not to be supposed that a court possessed of all the facts and circumstances of the case would permit itself to be used for such purpose. "In general, it may be stated that in all cases where, by accident, or mistake, or fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere and restrain him from using the advantage which he has thus improperly gained." (Story's Equity Jurisprudence, sec. 885.) In *Insurance Co. v. Hodgson*, 7 Cranch, 332, Chief Justice Marshall laid down the rule in such cases as follows: 'Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may be safely said that any fact which clearly appears to be against conscience to execute a judgment, and of which the injured party could not have availed himself at law, or of which he might have availed himself at law but was prevented by fraud or accident, unmixed with any fraud or negligence in himself or his agents, will justify an application to a court of chancery.' In this case the respondent was entirely helpless as against the proceedings in the probate court initiated and carried on by the appellant. The proceeding to set aside family allowance is *ex parte*. In fact, an order for such purpose can be entered by the court of its own motion. The complaint charges and the court finds the suppression of a material fact, which matter thus suppressed and withheld was a fraud, not only against the respondent, but also a fraud committed upon the court. The fraud, however, was extrinsic and collateral to the question ex-

amined on the application for the family allowance. The case, therefore, does not fall within the restrictions against setting aside judgments of courts obtained through intrinsic fraud, such as *United States v. Throckmorton*, 98 U. S. 61, and other cases in that line relied upon by appellants. The respondent had no adequate relief, either by appealing from the order entered in the probate court or upon motion to set it aside. The probate court does not possess the requisite machinery to try a question of fraud; that is the peculiar province of a court of equity. (*Estate of Hudson*, 63 Cal. 454; *Dean v. Superior Court*, 63 Cal. 473; *Wickersham v. Comerford*, 96 Cal. 433, 440; *Bergin v. Haight*, *supra*.)

Wickersham v. Comerford, *supra*, was an action to set aside an order of the probate court designating and setting apart a homestead to the defendant, the widow of Richard Comerford. Said Comerford, some time prior to his death, had entered into an agreement of separation with his wife, Sarah, under which agreement the property of said parties was divided, and she relinquished all right as wife in law or equity for support and maintenance. Upon the execution of this agreement the parties immediately separated and never again lived together. The wife with her minor son removed to Alameda county upon the property which was conveyed to her under the deed of separation, and the husband remained at their former place of residence in Sonoma county. After his death the wife took out letters of administration upon his estate, and thereafter made an application to have certain property in Sonoma county, which had been purchased by the husband with the proceeds of his separate estate, set apart to her as a homestead, which application was granted by the probate court of said county. On the application for setting apart the homestead nothing was stated in reference to the deed of separation or the division of the property thereunder. The complaint in the case charged a willful suppression of material facts, and the suggestion of a falsehood by the defendant with the intent to deceive and mislead the court to the prejudice of the creditors of the estate, and averred that such suppression and suggestion had the intended effect to the injury of the plaintiff, who was one of such creditors. This court held that that constituted fraud, and answers the contention on the part of the defend-

ant there that the only remedy was an appeal from the order setting apart the homestead as follows: "No doubt that order was appealable, but conceding that plaintiff's relation to the case (that of a mere creditor of the estate whose claim had not been allowed) was such as would have entitled him to appeal from that order, yet he could have obtained no adequate relief by such appeal; since neither the fraud upon which this action is grounded, nor the fact that plaintiff was a creditor, could have been brought into the record on appeal from that order. Nor did plaintiff have an adequate remedy by motion to vacate the order, even conceding that he was entitled to make such motion, and had made it within the proper time. To say nothing of the disadvantage of trying an issue of fraud on such a motion, he could not have appealed from an order denying the motion, because the order sought to be vacated, viz., the order setting apart the homestead, was itself an appealable order. (Citing a number of cases.) It will hardly be contended that a remedy for the wrongs complained of, thus restricted, is not defective and inadequate, as compared with an original equitable action adapted to a thorough investigation of the issues, and in which all errors committed by the trial court may be corrected on appeal."

Johnson v. Waters, 111 U. S. 640, was an original suit in the circuit court of the United States for the district of Louisiana, brought for the purpose of setting aside fraudulent and void sales made by a testamentary executor under the orders of the probate court in said state. In that case it was contended that the plaintiff was concluded by the proceedings in the probate court, which was alleged to have exclusive jurisdiction of the subject matter, and that its decision was conclusive against the world, especially against the plaintiff, who was a party to the proceeding. The supreme court of the United States in its opinion, conceding that the administration of the estate there in question properly belonged to the probate court, and that, in a general sense, the decisions of that court were conclusive and binding, especially upon parties, said: "But this is not universally true. The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact

of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of fraud. The court of chancery is always open to hear complaints against it, whether committed *in pais* or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceedings in another court; but it will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it and of any inequitable advantage which they have derived under it." (Citing a large number of cases.)

Arrowsmith v. Gleason, 129 U. S. 86, presented the question as to the jurisdiction of a probate court to make a sale of the lands there in controversy, and confirm sales reported by the guardian in said proceeding in probate. It was claimed there, as here, that the party complaining was bound by the judgment and orders of the probate court. The supreme court of the United States, however, says in its opinion: "But it is insisted that the circuit court of the United States, sitting in Ohio, is without jurisdiction to make such a decree as is specifically prayed for, namely, a decree setting aside and vacating the orders of the probate court of Defiance county. If by this is meant only that the circuit court cannot by its orders act directly upon the probate court, or that the circuit court cannot compel or require the probate court to set aside or vacate its own orders, the position of the defendants could not be disputed. But it does not follow that the right of Harmenting, in his lifetime, or of his heirs since his death, to hold these lands, as against the plaintiff, cannot be questioned in a court of general equitable jurisdiction on the ground of fraud. If the case made by the bill is clearly established by proof, it may be assumed that some state court, of superior jurisdiction and equity powers and having before it all the parties interested, might afford the plaintiff relief of a substantial character. But, whether that be so or not, it is difficult to perceive why the circuit court is not bound to give relief according to the recognized rules of equity as administered in the courts of the United States."

To the same effect is *Bowen v. Evans*, 2 H. L. Cas. 257: "If a case of fraud be established, equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivance by which it may have been attempted to protect them. It is immaterial, therefore, whether such machinery and contrivances consisted of a decree of equity, and a purchaser under it, or of a judgment at law, or of other transactions between the actors in the fraud."

It appears, therefore, from the foregoing cases—and many others to the same effect might be cited—that it was not necessary to first revise or set aside the orders made by the probate court. The desired purpose can be accomplished by allowing the sale ordered by that court to proceed, but to direct and control the disposition of the proceeds of such sale according to the right of the case, and this was done by the court below in its decree.

The order herein for the family allowance, and also for the sale of the real estate, were made by the superior court in the exercise of its probate jurisdiction. No appeal was taken from either of these orders, nor was any motion to modify or set them aside made in the proceeding before the probate department until after the time limited for an appeal therefrom, and the orders had thus become final, and no relief from them could be had in the probate department even if under any circumstances that department could have given relief. When it appeared that the order for family allowance had been made to reimburse the widow for moneys which she had already expended in the support of her family, and that she had obtained these moneys from the assignors of the plaintiff herein by mortgaging her interest in the estate as security for their repayment, and, without disclosing this fact, had as executrix obtained an order for the sale of the entire estate under which the purchaser would take the title discharged of such mortgages, there was presented the precise case in which a court of equity should interfere to control the enforcement of the judgment of another court by directing the application of the proceeds of that sale.

In its judgment herein the superior court does not purport to set aside or modify either of these orders, but controls Mrs. Schell in the disposition of the moneys which may be received by her upon the family allowance. Neither does the court assume to determine the amount of the charges and expenses of administration which are to be paid out of the proceeds of the sale. These matters, as well as the return of sale that may be made under the order of sale, and the hearing upon the application for its confirmation, are within the jurisdiction of the probate department, and will be determined by it. The superior court by its judgment herein in no respect interferes with the jurisdiction of the probate department in reference thereto. It takes control of the disposition of the proceeds of the sale after the confirmation and payment of those charges and expenses, and at that point intercepts the appropriation by Mrs. Schell to herself of the proceeds of the sale of her interest in the real estate which she had mortgaged to the assignors of the plaintiff by compelling the executrix to apply these proceeds, as far as may be necessary or applicable, in satisfaction of the liens which Mrs. Schell, as widow and heir of the deceased, had created upon that interest for the express purpose of obtaining the money for the reimbursement of which the order of sale was made. The judgment merely compels the executrix to make the payment of the family allowance to the assignee of the widow in accordance with contracts theretofore made by her.

The equitable relief thus sought could not be granted in the probate department of the court, for the reason that such relief is not within its probate jurisdiction. Sitting as a court of probate, the superior court exercises a special and limited jurisdiction under statutory procedure, and, although guided by principles of equity in the exercise of that jurisdiction, does not exercise its general jurisdiction in equity, but is limited to matters in probate, and, in the administration of the estates of decedents, to the objects of such administration. These objects are the temporary preservation and protection of the estate of the deceased, the satisfaction or payment of such debts and claims as are charges or liens upon it, and the distribution of the residue to those who are entitled thereto. Incidentally, the expenses incurred in the administration, and

a temporary provision for the support of the family, including a homestead where proper, are to be taken from the estate. This provision, however, is in reality a distribution of a portion of the estate to those who by virtue of the statute are entitled thereto. Under its probate jurisdiction the court cannot bring before it strangers to the estate for the purpose of adjusting their claims to property held by the executrix or administrator, or for determining their rights to the proceeds of a sale derived under those for whose benefits the sale was ordered. For this want of jurisdiction in the proceeding for the administration of the estate, the equity jurisdiction of the court was properly invoked and exercised herein.

The judgment and the order denying the motion to vacate and set aside the said judgment are affirmed.

Temple, J., Harrison, J., McFarland, J., and Henshaw, J., concurred.

BEATTY, C. J., concurring.—I concur in the judgment and generally in the opinion of Justice Van Dyke. I am not, however, prepared to say that the probate court, as such, is without jurisdiction, in making an order of family allowance for the purpose of reimbursing moneys advanced for family support, to extend the benefit of its order to a third party who, at the request of the executor or administrator, has made such advances. I think, on the contrary, that if in this instance the facts had been disclosed to the probate court at the time the order of sale was made it would have been perfectly competent for that court to have directed payment to the plaintiff here of all sums advanced by her for the support of the family. This view does not in my opinion invalidate the conclusion that she can sustain the present action to enforce her equitable claim upon the fund which will result from the sale of the property. She had no actual notice of the proceeding in the probate court, and her failure to make her claim there was not her fault, but the fault of the defendant.

[S. F. No. 1311. Department One.—July 19, 1900.]

D. C. SAMPLE, Respondent, v. FRESNO FLUME AND IRRIGATION COMPANY, Appellant.

CONTRACT WITH WATER COMPANY—BLANK EXHIBIT TO BE EXECUTED—CERTAINTY.—A contract with a water company, in which it agreed, in consideration of the transfer to it of certain stock and other privileges, to furnish a specified quantity of water, and a transfer of said water rights to be drawn upon the form adopted by the corporation annexed as a blank exhibit, and subject to its terms and conditions, to be executed between the parties and subject to the reasonable rules and regulations of the company not conflicting with the contract or the agreement to be executed, is not rendered void for uncertainty by the absence from the blank exhibit of the price of the water right and the annual rent to be paid. The price was fixed by the consideration received, and the annual rent or rate was a mere incident to the agreement, subject to reasonable change as circumstances may require.

ID.—REASONABLE INTERPRETATION—VALIDITY OF CONTRACT.—The contract should receive a reasonable interpretation, and such that would give it effect, instead of that which would make it void; and where, taking the two papers together, and having in view the circumstances under which the contract was entered into, the meaning and intention of the parties can be understood with sufficient clearness, the validity of the contract must be sustained.

ID.—BREACH OF CONTRACT—ACTION FOR DAMAGES—PENDING INJUNCTION NOT A DEFENSE.—The water company is liable in an action for damages for breach of its contract to furnish the water as agreed, where the findings establish that it completed its flumes and ditches to and beyond the point at which it agreed to deliver it, and that in the exercise of reasonable diligence it could have delivered the water, and failed to do so. It is no defense to such action that, at suit of another corporation, the defendant has been enjoined from diverting sufficient water to comply with the contract, and that such injunction is still pending.

ID.—EXCUSE FOR NONPERFORMANCE—PREVENTION—INABILITY—IMPOSSIBILITY.—An injunction at suit of a private litigant is not a prevention by operation of law, nor by an irresistible superhuman cause, and is not a legal excuse for nonperformance of the contract. If what is agreed to be done is possible under any circumstances, notwithstanding any difficulty or inability of the party, under unforeseen circumstances, to comply with the contract, he must make compensation in damages for nonperformance. The impossibility which

will excuse nonperformance must consist in the nature of the thing to be done, and not in the inability of the party to do it, unless such inability is provided against in the terms of the contract.

ID.—DELAY IN DETERMINING INJUNCTION SUIT—MODIFICATION.—Where great delay is apparent in determining the injunction suit and no steps had been taken after the lapse of several years to have the injunction dissolved, but it appears that it was modified to permit the defendant to divert some water, it cannot be left optional with the defendant to comply with its contract or not as its convenience may dictate.

ID.—RETENTION OF CONSIDERATION.—The defendant cannot retain the consideration paid for carrying out the contract, and refuse or neglect to carry out its part thereof.

APPEAL from a judgment of the Superior Court of Fresno County and from an order denying a new trial. E. W. Risley, Judge.

The facts are stated in the opinion of the court.

L. L. Cory for Appellant.

The agreement is void for uncertainty, and cannot be enforced. (*Easton v. Millington*, 105 Cal. 49; *Rauer v. Fay*, 110 Cal. 361; *Van Slyke v. Broadway Ins. Co.*, 115 Cal. 644; *Talmage v. Arrowhead Reservoir Co.*, 101 Cal. 367; *Lyman v. Robinson*, 14 Allen, 242; *Pepper v. Harris*, 73 N. C. 365; *Atkins v. Van Buren Scholl Tp.*, 77 Ind. 447; *Leslie v. Smith*, 32 Mich. 64; *Brown v. New York Cent. R. R. Co.*, 44 N. Y. 79, 83; *Mayer v. McCreery*, 119 N. Y. 434.) The promise was conditional, and the conditions of liability have not been fulfilled, and the defendant is not in default. (Bishop on Contracts, sec. 580; *Bachman v. Meyers*, 49 Cal. 220; *Cox v. McLaughlin*, 63 Cal. 196; *Hanson v. Slaven*, 98 Cal. 377; *Stockton v. Weber*, 98 Cal. 433; *Henry v. Sacramento*, 116 Cal. 628; *Tebo v. Robinson*, 109 N. Y. 27.) The defendant was excused from performance by a supervening impossibility. (Hollingsworth on Contracts, 559; 1 Beach on Contracts, sec. 773; *Lorillard v. Clyde*, 142 N. Y. 456; *Heine v. Meyer*, 61 N. Y. 171.) Legal process or obedience to an order of court is a sufficient prevention of performance. (*Melville v. De Wolf*, 4 El. & B. 844; *Lehigh Zinc etc. Co. v. Trotter*, 42 N. J. Eq. 678; *People v. Globe Mut. etc. Co.*, 91 N. Y. 174; *Burkhardt v. Georgia School Tp.*, 9 S. Dak. 315.)

M. K. Harris, for Respondent.

The contract is not void for uncertainty. It must be construed according to the intention of the parties. (*Saunders v. Clark*, 29 Cal. 300.) He who agrees to do an act must do it unless it is absolutely impossible. He should provide against contingencies in the contract. (*Dermott v. Jones*, 2 Wall. 6; *McGehee v. Hill*, 4 Port. 170¹; *Adams v. Nicholas*, 19 Pick. 275²; *Reid v. Edwards*, 7 Port. 508³; *Booth v. Spuyten Duyvil etc. Co.*, 60 N. Y. 487; *Tompkins v. Dudley*, 25 N. Y. 272⁴; *School Dist. No.1 v. Dauchy*, 25 Conn. 530⁵; *Superintendent of Schools v. Bennett*, 27 N. J. L. 373.⁶) The injunction was no excuse for nonperformance. (*Klauber v. San Diego Street-Car Co.*, 95 Cal. 357, 358.) The obligor contracts that he can and will control the acts of third parties, so far as necessary to enable him to perform his contract. (*People v. Bartlett*, 3 Hill, 570.) Under section 527 of the Code of Civil Procedure, amendment 1895, this injunction does not continue in force for a longer period than one year from the time it was granted, except by defendant's consent. This law is applicable to said injunction, although enacted after the injunction was issued. (*Moore v. Martin*, 38 Cal. 428; *Oullahan v. Sweeney*, 79 Cal. 537⁷; *Mill etc. Co. v. Olmstead*, 85 Cal. 81.)

VAN DYKE, J.—This is an action for damages arising from an alleged breach of a contract concerning water rates. The plaintiff had judgment in the court below for the sum of seven thousand two hundred dollars and costs of suit. The appeal is taken from said judgment and from the order denying defendant's motion for a new trial.

The first point made by the appellant is that the contract in question is void for uncertainty. The defendant corporation, it seems, was formed for the purpose of acquiring water and water rights, and to divert and use the same by means of flumes, ditches, reservoirs, and other conduits for irrigation, milling, fluming, and other purposes, and the sale, lease, and rent of water and water rights and waterworks, and in pursu-

¹ 29 Am. Dec. 277.

² 31 Am. Dec. 137.

³ 31 Am. Dec. 720.

⁴ 82 Am. Dec. 349.

⁵ 68 Am. Dec. 371.

⁶ 72 Am. Dec. 373.

⁷ 12 Am. St. Rep. 172.

ance of these objects and purposes on its part the defendant had to secure means to carry the same into execution. On the 10th of June, 1892, it entered into the contract in question with one Benjamin Kendricks, assignor of the plaintiff, a copy of which is as follows:

"Know all men by these presents, that the Fresno Flume and Irrigation Company, a corporation duly organized and existing under and by virtue of the laws of the state of California, for and in consideration of the transfer to it of certain stock and other privileges by Benjamin Kendricks, and other valuable consideration to it in hand paid, the receipt whereof is hereby acknowledged, does hereby promise and agree to and with the said Benjamin Kendricks to make, execute, and deliver to said Benjamin Kendricks whenever its ditches flumes, and works are completed to Big Dry creek, at or near section 21, in township 12 south, of range 22 east, Mount Diablo base and meridian, and whenever it is ready to furnish and deliver water therein, and at said place, agreements and water rights, deed or deeds sufficient in form and effect to entitle the said Benjamin Kendricks to the use of six (6) cubic feet of water per second, said water rights to be drawn upon the form adopted by said corporation hereto annexed, exhibit 'B,' and subject to each and all of the conditions and agreements thereof, to be signed and executed by each of said parties, or to whichever party the said Benjamin Kendricks may assign his interest in and to any portion of said water. Said water to be furnished in pursuance of said agreement so to be executed, subject to each and all of the reasonable rules and regulations of said corporation which it has adopted or may adopt; said rules and regulations not to conflict with the provisions of this agreement, and said agreement so to be executed."

The objection seems to go to the form of water rights annexed to the contract, and the particular in which the form seems to be incomplete is that there is a blank left for the price to be paid for the water rights and the amount of the annual rents. In this case, however, the blank in the form in reference to the price to be paid cuts no figure, inasmuch as

the full value of the water rights was paid by Kendricks at the time of entering into the contract, by the transfer of certain stocks and other privileges, held by him, to the defendant corporation. It was altogether unnecessary to repeat this in the form attached to the contract when it had already been specified in the contract itself, and the two papers have to be read together. The form was evidently prepared by the company to be used in reference to water rights, when they were to be sold upon a credit. As to the sum to be charged as annual rent, that is a mere incident to the agreement, and subject to changes as circumstances may require. The only limitation upon the right of the defendant to make changes or fix this annual or rate is that it must be reasonable.

Taking the two papers together, and having in view the circumstances under which the contract was entered into, the meaning and intention of the parties can be understood with sufficient clearness. The contract should receive a reasonable interpretation, and such that would give it effect, instead of that which would make it void. (Civ. Code, secs. 3541, 3542.)

It is further contended on the part of the appellant that the company is only required to execute and deliver agreements, water rights, and deeds to entitle the plaintiff, as assignor of Kendricks, to the water mentioned in the contract, whenever it is ready to furnish and deliver the water therein at the place mentioned, and that it is not yet ready to furnish said water. The court finds, however, "that on or about the first day of July, 1894, the defendant had completed its flumes and ditches to and beyond said Big Dry creek, at or near said section 21, township 12 south, of range 22 east, Mount Diablo base and meridian, and said flumes and ditches ever since have been and now are, in a condition to receive and deliver said water to this plaintiff, and ever since the said first day of July, 1894, by the exercise of reasonable and proper efforts and diligence on its part, it has been possible for said defendant to and it could have delivered to plaintiff said six cubic feet of water so agreed to be delivered."

It is contended, however, as another reason why the defendant is not ready to furnish and deliver water according to said

agreement, that it has been enjoined from diverting water, and the injunction still remains in force. It appears that on the twenty-fifth day of September, 1894, an action was commenced in the superior court of the city and county of San Francisco by the San Joaquin and Kings River Canal and Irrigation Company as plaintiff against said defendant; that an injunction was issued and granted by said court upon the application of said plaintiff in said action, and served upon said defendant, commanding the defendant to desist from diverting or from doing any act to divert the waters from Stevenson creek, or of the San Joaquin river, and from obstructing by means of dams or other obstructions the flow of water from Stevenson creek and the San Joaquin river down to the canal and riparian lands of the plaintiff in said action, which canal and lands were situated below the point specified in the memorandum of agreement as the point where the defendant was to deliver water. That said injunction has since remained in full force and effect, except that the same was modified to permit the defendant to divert sufficient water to conduct fluming operations in the county of Fresno.

This is not a legal reason or excuse for nonperformance of the contract on the part of the defendant. It is not a prevention by operation of law, or by an irresistible, superhuman cause. (Civ. Code, sec. 1511.) This question was considered in *Klauber v. San Diego Street-Car Co.*, 95 Cal. 353. The court there say: "No case has been cited in which it has been held that interference by a writ sued out by a private litigant will excuse performance of a contract, although it may deprive the contractor of the means of performance. It is not prevention by operation of law. It is the act of an individual, and not of the government. In a certain sense, the property so taken may be in the custody of the law, and yet the seizure may be wrongful and the suitor held responsible as for a trespass and damages. The law recognizes the fact that these private remedies may be wrongfully—that is, illegally—used, and the litigant is required to give security for any damage that may be caused if it should be finally decided that the writ was improperly issued. This cannot be called the operation of law within the meaning of the Civil Code. . . . Nor would it be a defense that the law has rendered it difficult or

very expensive to perform. The rule is, if performance is in itself possible, there is a breach, although the obligor himself may have become wholly unable to perform. . . . To warrant the application of the principle, the impossibility must consist in the nature of the thing to be done, and not in the inability of the party to do it; or as it is sometimes termed, be an *impossibilitas rei* as distinguished from an *impossibilitas facti*. If the thing could be accomplished by anyone with proper means and the requisite skill and knowledge, the promisor was not less answerable because it was impossible to him. (Hare on Contracts, 639.) The principle deducible from the authorities is that, if what is agreed to be done is possible or lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail a defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse nonperformance." (*The Harriman*, 9 Wall. 172.) As was said in *Wilmington Transp. Co. v. O'Neil*, 98 Cal. 5: "Where a party has expressly undertaken without qualification to do anything not naturally or necessarily impossible under all circumstances, and he does not do it, he must make compensation in damages, though the performance was rendered impracticable or even impossible by some unforeseen cause over which he had no control, but against which he might have provided in his contract."

The injunction suit referred to, it seems, was commenced September 25, 1894, and yet at the time of the commencement of this action, and also at the trial thereof on the 30th of April, 1897, no steps were shown to have been taken to have said injunction dissolved, nor does it appear that any especial efforts have been made upon the part of the defendant to have the case determined. It does appear, however, that the injunction was modified to permit the defendant to divert sufficient water to conduct the fluming operations in the county of Fresno. Plaintiff, the assignee of the original party to the contract, and for whose benefit it seems the contract was made, is shown to own a large body of land necessary to be irrigated, and it is fair to presume that the parties understood at the time of entering into the agreement that the system of irrigation works should be constructed and completed at least within a reasonable period of time, and the

fact that the water rights were paid for at the time of entering into the contract furnishes further evidence that such was the understanding. It is not reasonable to suppose that one of the parties to this contract paid a consideration for the water rights and water to be supplied, leaving the question entirely optional with the defendant to comply with the contract or not, as convenience might dictate. The defendant cannot refuse or neglect to carry out its part of the contract, and still retain the consideration paid for carrying it out.

The evidence supports the findings. Appellant's objections to certain rulings of the court made during the progress of the trial in reference to the introduction of testimony are not well taken.

Judgment and order affirmed.

Harrison, J., and Garoutte, J., concurred.

Hearing in Bank denied.

[Sac. No. 648. Department One.—July 19, 1900.]

HENRY WILLIAMS, Respondent, v. W. G. LONG et al. Defendants. GAGNERE MINING COMPANY, Appellant.

EJECTMENT FOR MINING CLAIM—INJUNCTION AGAINST WASTE—DISCRETION OF COURT—AFFIDAVITS ON MOTION TO DISSOLVE.—In an action of ejectment to recover possession of a mining claim, where the verified complaint is sufficient to support a preliminary injunction to prevent waste of the mine pending suit, the court may grant such injunction, and has discretion to maintain it, notwithstanding affidavits of the defendants on motion to dissolve the injunction may deny the equities of plaintiff's case, and show a case of hardship upon the defendant.

ID.—IMPROPER RESTRAINT OF DEFENDANTS.—An injunction in an action of ejectment cannot properly restrain the defendants from "enter-upon" the land sued for, or from "in any manner trespassing there-upon," or from "working thereon," provided no waste is committed. In all other respects than extracting or removing ore from the mine or committing waste, the defendants are entitled to use the mine pending the suit as their occasion may demand.

ID.—APPEAL FROM ORDER REFUSING TO DISSOLVE INJUNCTION—MERITS OF CASE NOT INVOLVED.—Upon an appeal from an order refusing to dissolve a preliminary injunction to prevent waste by the defendants pending an action of ejectment, the merits of the case, or the right of plaintiff to recover in the action, are not involved, and cannot be considered.

APPEAL from an order of the Superior Court of Tuolumne County refusing to dissolve an injunction. G. W. Nicol, Judge.

The facts are stated in the opinion.

C. C. Hamilton, for Appellant.

F. P. Otis, for Respondent.

SMITH, C.—Appeal from an order refusing to dissolve a preliminary injunction restraining the defendants “from entering in and upon the mining claim of the plaintiff [called the “Marryatt mine”], and from mining and working thereon, and from taking and removing any gold and gold-bearing earth and rock therefrom, and from in any further manner trespassing thereon.”

The injunction was issued without notice on the verified complaint. The complaint is in ejectment, in the ordinary form, but alleges, also, in effect, that the defendants are mining the premises in controversy, and have removed and are removing therefrom gold-bearing earth and rock, and will continue to do so unless restrained.

It appears from the affidavits used on the hearing of the motion to dissolve that the defendant corporation was in possession of the premises in controversy under a contract of sale made by the plaintiff to the defendant Long, its grantor, and was in default in the payment of one of the installments of the purchase money; and also that it was the owner of an adjoining mine, which it was then engaged in working, and from which the only outlet for removing the ore mined was through the Marryatt mine, by means of appliances constructed therein by defendant; and that the Gagnere mine could not otherwise be worked except by the construction of a new shaft and appliances, at a heavy expenditure of time and money. Other matters are stated in the affidavits of the defendants—as, e. g., certain facts alleged in excuse for default in payment, the irreparable damage that would be done to the defendant corporation by closing its mine, that it had

not taken any ore from the Marryatt mine since its default in payment (which is not denied), and that it had no intention of doing so, etc.; but these we do not deem it necessary to consider.

It is quite clear that, upon the facts alleged in the complaint, the court was justified in restraining the defendant "from taking and removing . . . gold and gold-bearing earth and rock" from the mine. Nor was its discretion to maintain the injunction affected by the facts disclosed by the affidavits. (2 Beach on Injunctions, secs. 1167 et seq., 1171, 1172, 1175.) But an injunction in an ejectment suit to restrain the defendant "from entering upon" the land sued for, or "from in any manner trespassing thereon," is a contradiction in terms, and therefore meaningless. For, in the technical sense of the words, one cannot enter or trespass on land of which he is already in possession. Nor can the defendants be restrained from "working" thereon, provided they do not commit waste.

The contention of respondent that under the express terms of the contract the land was to revert to him, on default, with all improvements, etc., cannot on this appeal be considered. Whether, upon the facts to be disclosed on the trial, the land shall so revert, and whether the plaintiff shall be restored to the possession, are questions to be determined at the final hearing. In the meantime, all that plaintiff is entitled to is that the defendants be restrained from extracting and removing ore from the mine, or from committing waste. In all other respects they are entitled, pending the suit, to use the mine as their occasions may demand.

We advise that the order appealed from be reversed and the cause remanded, with directions to the court to modify the injunction heretofore issued in the case as indicated in this opinion.

Chipman, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is reversed and the cause remanded, with directions to the court to modify the injunction heretofore issued in the case as indicated in this opinion.

Harrison, J., Van Dyke, J., Garoutte, J.

Hearing in Bank denied.

[L. A. No. 638. Department One.—July 19, 1900.]

GAETANO BERONIO, Jr., et al., Appellants, v. VENTURA COUNTY LUMBER COMPANY, Respondent.

QUIETING TITLE—ANNULMENT OF SHERIFF'S DEED—MORTGAGE SUBSEQUENT TO CONVEYANCE—SINGLE CAUSE OF ACTION—DEMURRER FOR MISJOINDER.—A complaint seeking to quiet plaintiff's title, and also to annul a sheriff's deed to the defendant under foreclosure of a mortgage made subsequently to the record of a conveyance by the mortgagor under which plaintiff claims title, states only a single cause of action for the enforcement of plaintiff's right to the premises in question against the unlawful claim of the defendant thereto, and is not subject to a demurrer for misjoinder of causes of action.

ID.—PLURAL REMEDIES FOR SINGLE RIGHT.—A plaintiff may frequently be entitled to several remedies of different kinds for the enforcement of a single right of action.

ID.—HOMESTEAD—BUSINESS AND HOTEL PROPERTY—CONVEYANCE BY HUSBAND—SUBSEQUENT JOINT MORTGAGE.—No valid homestead claim can be made upon premises used for a general merchandise store and hotel, though the family may reside in such hotel; and a conveyance made by the husband alone of such premises which were his separate property, after a declaration of homestead had been filed by him thereupon, passed title to the grantee, and plaintiffs claiming under such conveyance duly recorded hold the title free from encumbrance of a subsequent mortgage executed jointly by the husband and wife, and from any title derived thereunder by the defendant through a sheriff's deed under foreclosure of such mortgage.

ID.—FORECLOSURE OF MORTGAGE—PARTIES DEFENDANT—PLEADING—RES ADJUDICATA—ADVERSE TITLE NOT INVOLVED.—Where the plaintiffs in the action to quiet title, having a title prior, adverse, and paramount to that of the mortgage, were made parties defendant to the foreclosure thereof, under the usual allegations in the complaint that the defendants other than the mortgagor claim some interest in the premises, and that such interest is subsequent and subordinate to that created by the mortgage, without setting forth the particulars of the defendants' claim, or showing that it was prior in time to the mortgage, the judgment of foreclosure does not become *res adjudicata* as to the prior adverse title of the plaintiffs.

ID.—ESTOPPEL OF FORMER JUDGMENT—IDENTITY OF QUESTIONS.—In order that a judgment in one action may constitute an estoppel against the parties thereto in a subsequent action, it must be made to appear, with certainty to every intent, either upon the

face of the record or by extrinsic evidence, that the identical questions involved in the issues to be tried were determined in the former action. What was involved must not be left to any uncertainty or conjecture; and that only is deemed to have been adjudged in the former action which appears upon the face of the record to have been so adjudged, or which was actually and necessarily included therein, or necessary thereto.

ID.—OBJECT OF FORECLOSURE OF MORTGAGE—TITLE OF MORTGAGOR AT DATE OF MORTGAGE—PROPER PARTIES—DISMISSAL OF ADVERSE CLAIMANTS.—The object of a suit to foreclose a mortgage is to vest in the purchaser at the sale the same title or estate which the mortgagor had at the date of the mortgage; and the only proper or necessary parties defendant are the mortgagor and those claiming under him subsequent to that date. Titles adverse to that of the mortgagor, or superior to the mortgage, are not proper subjects for determination; and the proper action of the court is to dismiss from the suit any of the defendants who appear to be adverse claimants of such a title.

ID.—CONCLUSIVENESS OF JUDGMENT AGAINST ADVERSE CLAIMANT—PLEADINGS.—If the complaint in foreclosure sets forth the facts upon which an adverse claimant made defendant bases his claim of title, and he allows issues to be tried thereon without objection, he is concluded by the judgment; but if it merely avers that he claims an interest, and that such interest is subsequent and subordinate to the mortgage, it negatives any claim of plaintiff that it was prior thereto and presents a mere conclusion of law, and the denial of these averments does not raise an issue upon a claim of title prior and adverse to that covered by the mortgage, or upon the validity thereof, and a claim of such title is not concluded by the judgment.

APPEAL from a judgment of the Superior Court of Ventura County. B. T. Williams, Judge.

The facts are stated in the opinion of the court.

Henning & Bowen, for Appellants.

Different requests for relief under one claim of right of action do not constitute different causes of action. (*Pomeroy* on Code Remedies, secs. 452, 454, 457, 459; *People v. Center*, 66 Cal. 555-67; *Chester v. Hill*, 66 Cal. 482, 484; *Axtell v. Gerlach*, 67 Cal. 483; *McLennan v. McDonnell*, 78 Cal. 274, 277; *Loveland v. Garner*, 71 Cal. 541; *Grandona v. Lovdal*, 70 Cal. 161.) The homestead claim to a place of business and hotel was void. (*Gregg v. Bostwick*, 33 Cal. 227, 228¹; *McDowell v. Creditors*,

103 Cal. 264²; *In re Ligget*, 117 Cal. 352³; *In re Allen*, 78 Cal. 294; *Tiernan v. Creditors*, 62 Cal. 286; *Laughlin v. Wright*, 63 Cal. 113-16.) The foreclosure proceedings did not involve any prior title to that of the mortgage; and the deed only vested in the purchaser such title as the mortgagor had at the date of the mortgage. (Jones on Mortgages, 3d ed., sec. 1589; *McComb v. Spangler*, 71 Cal. 418; *Ord v. Bartlett*, 83 Cal. 428; *Cody v. Bean*, 93 Cal. 578; *Sichler v. Look*, 93 Cal. 600; *Hoppe v. Fountain*, 104 Cal. 94.)

Blackstock & Ewing, for Respondent.

The prayer may determine the nature of the action, and show a misjoinder. (*Nevada County etc. Co. v. Kidd*, 37 Cal. 304, 317.) The adjudication against the title of the plaintiffs in the foreclosure suit is valid until reversed. (1 Freeman on Judgments, 540.) The excess in value of the homestead did not render it void; and a deed by the husband alone while the homestead was subsisting is absolutely void. (*Gleason v. Spray*, 81 Cal. 217⁴; *Ham v. Santa Rosa Bank*, 62 Cal. 125.⁵) The homestead law is to be liberally construed. (*Quackenbush v. Reed*, 102 Cal. 493.) The homestead claim should be sustained upon that portion of the property resided on by the family. (*King v. Gotz*, 70 Cal. 236.)

HARRISON, J.—Suit to quiet title. The complaint sets forth that in the year 1884 Gaetano Beronio, Sr., was the owner of the land involved in the action, and built thereon a two-story brick building for the purpose of conducting therein a general merchandise store and hotel. He was at that time unmarried, and with his servants conducted said business and hotel until December 29, 1886, when he married, and thereafter with his wife continued to conduct said business, occupying a portion of the building with his family for that purpose. There were several other buildings upon the lot, separated from the hotel building, all of which were used in connection with the hotel business, but not as the dwelling of Beronio or of his family. February 3, 1887,

² 42 Am. St. Rep. 114.

³ 59 Am. St. Rep. 190.

⁴ 15 Am. St. Rep. 47.

⁵ 45 Am. Rep. 654.

he executed and acknowledged a declaration of homestead upon said lot, sufficient in form, and filed the same with the county recorder. January 10, 1891, he executed a deed of conveyance of said lot to Charles Ingalls, which was recorded in the office of the county recorder on the same day. This conveyance was intended for the benefit of the plaintiffs here, and on June 4, 1892, Ingalls conveyed the lot to them by deed, which was recorded on the same day. April 13, 1892, Beronio, Sr., and his wife executed a mortgage of the lot to Roger McMenamin, and on December 13, 1896, Catherine Walsh, to whom this mortgage had been assigned, commenced an action for its foreclosure, in which these plaintiffs were named as defendants. In the complaint therein it was alleged that these plaintiffs claimed an interest in said mortgaged premises, and that their claim was subsequent and subordinate to said mortgage, and the court found and decreed in that action in accordance with this allegation. Under the judgment rendered therein the property was sold by the sheriff October 16, 1897, to Catherine Walsh for the amount of the judgment and costs, and immediately thereafter she assigned the sheriff's certificate to the defendant herein, to whom on April 17, 1898, the sheriff executed a deed of conveyance. Upon these facts the plaintiffs ask that the sheriff's deed be adjudged void, and that their title to the premises be quieted against any claim of the defendant. The defendant demurred to the complaint upon the ground that it failed to state a cause of action, and also upon the ground that two causes of action had been improperly united therein, viz., an action to quiet the plaintiff's title and an action to have the sheriff's deed declared void. The demurrer was sustained by the court, and from the judgment entered in favor of the defendant the plaintiffs have appealed.

1. The complaint presents only a single cause of action, viz., the enforcement of the plaintiff's right to the premises in question against the unlawful claim of the defendant thereto. As a portion of the remedy for the enforcement of that right it seeks the annulment of the sheriff's deed, but a plaintiff may frequently be entitled to several species of remedy for the enforcement of a single right. (*Pomeroy's*

Code Remedies, sec. 459; *Hutchinson v. Ainsworth*, 73 Cal. 452⁶; *McLennan v. McDonnell*, 78 Cal. 273.)

2. Upon the authority of *McLaughlin v. Wright*, 63 Cal. 113, affirmed in *McDowell v. His Creditors*, 103 Cal. 264,⁷ the declaration filed by Beronio did not have the effect to impress the property with any of the characteristics of a homestead. The conveyance by Beronio, without his wife uniting therein, had the effect, therefore, to transfer to Ingalls the title to the property, and, being of record at the date of the execution of the mortgage, was notice to the mortgagee that Beronio had already parted with his title thereto. Under the conveyance by Ingalls to the plaintiffs they therefore took the property freed from the encumbrance of the mortgage, or of any title derived thereunder.

3. It is contended, however, on behalf of the defendant that, inasmuch as the plaintiffs herein were made parties defendant in the foreclosure suit, and the court decreed in that action that their rights and interests in the mortgaged premises were subsequent and subordinate to the mortgage, they are estopped from asserting any claim thereto adverse to the title derived by virtue of the sale under said judgment of foreclosure.

In order that a judgment in one action may constitute an estoppel against the parties thereto in a subsequent action, it must be made to appear, either upon the face of the record or by extrinsic evidence, that the identical questions involved in the issues to be tried were determined in the former action. (1 Greenleaf on Evidence, sec. 528; *Kerr v. Hays*, 35 N. Y. 331; *Cromwell v. County of Sac*, 94 U. S. 351; *Russell v. Place*, 94 U. S. 606; *Lillis v. Emigrant Ditch Co.*, 95 Cal. 553.) "Every estoppel must be certain to every intent, and not to be taken by argument or inference." (Coke on Littleton, 352 b.) "If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence." (*Russell v. Place*, *supra*.) By section 1908, subdivision 2, of the Code of Civil Procedure, the effect of a judgment is conclusive "in respect to the matter directly adjudged,"

⁶ 2 Am. St. Rep. 823.

⁷ 42 Am. St. Rep. 114.

and, by section 1911, "that only is deemed to have been adjudged in a former action which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

The object of a suit for the foreclosure of a mortgage is to subject to a judicial sale and vest in the purchaser thereunder the same title or estate in the mortgaged property which the mortgagor had at the time of the execution of the mortgage; and the only proper or necessary parties defendant to such suit are the mortgagor and those who claim an interest in the property derived subsequent to the date of the mortgage. Titles adverse to that of the mortgagor, or superior to that covered by the mortgage, are not proper subjects for determination in the suit. (Jones on Mortgages, sec. 1589; Wiltsie on Foreclosure, secs. 191, 192; *McComb v. Spangler*, 71 Cal. 418.) Whenever it is made to appear that the interest of a defendant is adverse or superior to that covered by the mortgage, the proper action of the court is to dismiss him from the suit. (*Ord v. Bartlett*, 83 Cal. 428; *Cody v. Bean*, 93 Cal. 578; *Hoppe v. Fountain*, 104 Cal. 94.) If, however, the plaintiff makes the holder of an adverse title a party defendant to the foreclosure suit, setting forth facts from which he claims that such title is subordinate to his mortgage, and issues upon these facts are presented for adjudication without objection on the part of the defendant, the judgment of the court thereon will not be void. The court may decline to pass upon the question as not germane to the suit for foreclosure, or it may determine that such claim of the defendant is unfounded, or that this interest in the premises is subordinate to the mortgage, or it may render a decree of foreclosure subject to the prior rights of such defendant. The subject matter of such controversy will be within the jurisdiction of the court, and, if the parties thereto submit the controversy to its determination, the judgment thus rendered will be as conclusive upon them as if rendered in an action specially brought for that purpose, and will not be subject to collateral attack. (*Helck v. Reinheimer*, 105 N. Y. 470; *Goebel v. Iffla*, 111 N. Y. 170; *Cromwell v. MacLean*, 123 N. Y. 474.)

Under the usual allegation in a complaint for foreclosure

that a defendant other than the mortgagor claims some interest in the premises, and that such interest is subsequent and subordinate to that created by the mortgage, any prior interest held by such defendant is not affected by the judgment therein. Such averment is not material to the plaintiff's cause of action, nor is it an issuable fact, and whether the court rendered judgment upon the default of the defendant, or upon an issue created by his denial of this averment, without setting forth the character of his interest, any prior interest held by him is not affected by such judgment. (*Lewis v. Smith*, 9 N. Y. 502^s; *Frost v. Koon*, 30 N. Y. 428; *Smith v. Roberts*, 91 N. Y. 470; *Payn v. Grant*, 23 Hun, 134; *Elder v. Spinks*, 53 Cal. 293; *Sichler v. Look*, 93 Cal. 600.)

It does not appear that in the foreclosure suit there was any adjudication upon the title of the plaintiffs which is set forth in the complaint herein, or that their claim that their interest in the mortgaged premises is superior to that derived under the mortgage was submitted to that court for determination, or was determined by it. The allegation in the complaint therein that they claimed an interest in the mortgaged premises, and that this claim was subsequent and subordinate to said mortgage, did not present this issue for determination. The averment that their claim was "subordinate" to the mortgage was but a legal conclusion, and the allegation of fact upon which that conclusion depended—that the claim was subsequent to the mortgage—negated any claim that it was prior thereto. The answer of these plaintiffs was but a denial of these allegations, and their admission that they had an interest in said premises as purchasers was not only consistent with the allegations of the complaint and with the object of the foreclosure suit, but failed to present any issue upon a claim of title superior to that covered by the mortgage, or upon the validity of such title. No facts were alleged, either in the complaint or in their answer, by which an issue upon their title or claim was presented to the court or made a subject for its determination, and the oral statement, and the oral statement of their attorneys to the court, and its finding and decree thereon that their claim and in-

terest were "subsequent" and subordinate to said mortgage, is of no higher force than if made upon their default.

The demurrer should, therefore, have been overruled.

The judgment is reversed, and the superior court is directed to enter an order overruling the demurrer of the defendant, and giving to it a reasonable time within which to answer the complaint.

Van Dyke, J., and Garoutte, J., concurred.

[L. A. No. 651. Department One.—July 19, 1900.]

FARMERS' EXCHANGE BANK, Appellant, v. MARY E. MORSE et al., Respondents.

JOINT NOTE—BENEFIT FROM CONSIDERATION—PRESUMPTION OF JOINT AND SEVERAL PROMISE—CONSTRUCTION OF CODE.—Section 1659 of the Civil Code, which provides that "where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several," cannot be construed to mean that the parties, though receiving some benefit from the consideration, may not create a joint liability upon a note expressly made joint and intended to be joint only, as provided for in section 1430 of the same code.

ID.—PRESUMPTION, WHEN INAPPLICABLE.—The presumption of a joint and several promise does not apply where there is an express joint obligation, in the absence of any facts to show a contrary intention.

ID.—PRESUMPTION OVERCOME—EXPRESS AGREEMENT FOR JOINT NOTE.—Where parties having several undivided interests in lands covered by several judgments of foreclosure expressly agreed with each other, in consideration of a conveyance of the mortgaged lands to a trustee to be conveyed to them severally in proportion to their interests, upon payment in full, to execute a joint note for the aggregate amount of the judgments, such express agreement overcomes the presumption of a joint and several promise, and the joint promise of such joint note must be enforced according to its terms.

ID.—ACTION UPON JOINT NOTE—PARTIES.—In an action upon a joint note upon which there is no several liability, all of the joint makers must be joined as parties defendant.

APPEAL from a judgment of the Superior Court of San Bernardino County. Frank F. Oster, Judge.

The facts are stated in the opinion.

Otis, Greeg & Hall, and Otis & Greeg, for Appellant.

C. C. Haskell, H. Conner, and Rolfe & Rolfe, for Respondents.

CHIPMAN, C.—Action on promissory note. Defendants demurred to the complaint; the demurrers were sustained, and plaintiff declining to amend, defendants had judgment, from which plaintiff appeals. The grounds of the demurrers were insufficiency of facts, defect and nonjoinder of parties defendants, and the statute of limitations. The note sued upon was in form the joint note of eight persons. Three of these joint makers, viz., G. E. Drew, H. L. Drew, and Charles J. Perkins, were not made parties to the action.

The complaint sets forth a series of agreements contemporaneous with the execution of the note, which explain the history of its execution. Plaintiff had caused the foreclosure of certain mortgages against the makers of the note, except as to one maker, Mrs. Atwood, who signed subsequently; the bank also held another mortgage which it was about to foreclose against these parties. The agreement recites that the bank is desirous of giving these persons further time to pay the sums referred to. It then recites: "We, and each of us, agree one with the other, in consideration of the extension of time to pay, etc., to sign a joint note, payable to said Farmers' Exchange Bank, for the aggregate sum total of said judgments, . . . and take said lands so mortgaged, subject to the agreement of the said bank above referred to (an agreement for further time) in the proportions as follows." Then follow the names of the parties and the proportions undivided by which they were to hold the lands.

A trustee was chosen to hold the title and to sell and convey the lands and pay the proceeds to the bank, and it was provided that when said note (the note in suit) was fully paid, the trustee should convey the remaining lands to the parties in the proportions named. This agreement was dated February 20, 1892, and was acknowledged February 24th. As part of the same transaction an agreement was entered into by the bank and these same parties at the same time, by which the bank agreed to bid in the mortgaged property and

assign the certificate of sale to the trustee agreed upon in the former agreement, and the same parties as before agreed "each to sign a joint note for the aggregate amounts above referred to . . . in favor of the Farmers' Exchange Bank," etc., and it was agreed that the lands should be sold by the trustee, and the bank agreed to credit the proceeds on the note, and the trustee was to convey the remaining unsold lands to the parties in the proportion agreed upon, as already stated. It is alleged that as a part of the same transactions and contemporaneously therewith the note in question was executed and delivered. At the same time the parties conveyed to the trustee. On October 22, 1892, the two Drews and Perkins conveyed to Mrs. Jane Atwood a certain portion of their interest in the lands, and she in turn agreed to sign the note already referred to, and in the recitals of her agreement the note is referred to as joint and several. At the same time Mrs. Atwood executed, acknowledged, and caused to be recorded a statement that she had been permitted to redeem the interest acquired by her through the Drews and Perkins, in consideration of which she agreed to sign the note referred to, and agreed also to the terms of the former agreements between the various parties, and thereupon signed the note. The complaint then recites several successive sales by the trustee and the credits of the proceeds on the note, leaving a balance unpaid of five thousand three hundred and seventy-four dollars and fifty-two cents. It is alleged that prior to the commencement of the action Perkins was discharged from all his debts as an insolvent debtor, and that Mrs. Kane, one of the makers of the note, not made a defendant by her administrator or otherwise, died before the suit was commenced. Appellant claims that the suit can be maintained on the note as joint and several, and that section 1659 of the Civil Code applies, which reads as follows: "Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several."

Section 1430 of the Civil Code provides: "An obligation imposed upon several persons, or a right created in favor of several persons, may be: 1. Joint; 2. Several; or 3. Joint and several." Section 1659 was intended to accomplish just what

it says, i. e., where all the makers of a note, for example, received some benefit from the consideration, and the fact is made in some way to appear, the law raises the presumption that the promise is joint and several. In this case all the parties did receive some benefit from the consideration, and the presumption follows. But this section of the code cannot be construed to mean that the parties, though receiving some benefit from the consideration, may not create a joint liability; section 1430 expressly says they may create such a liability. Where it appears that the parties received some benefit from the consideration, and nothing further is shown from which their intention can be ascertained, the law steps in and makes the promise joint and several. But where it clearly appears that such was not the intention of the parties, and it clearly appears, on the contrary, that the intention was that the promise should be joint, the presumption is overcome, and the promise must be enforced according to its express terms.

Appellant cites *Yorks v. Peck*, 14 Barb. 647, where it was said: "Where a note is made by two persons, which in terms is joint only, upon the death of one of the makers the surviving maker only is liable on it, unless it appears by direct proof, or the facts of the case warrant the inference, that the parties intended that it should be joint and several." (Citing several cases.) The opinion proceeds: "If such an intention is expressly proved, or may be inferred from the transaction, the note will be treated as if it was joint and several, and in that case the person representatives of the deceased maker are liable for its payment. (Same cases.) In all cases of a joint note given upon a joint loan of money or a joint liability of any kind, it will be presumed it was intended the note should be several as well as joint, and effect will be given to it according to that intention." We think this decision states what our code provision was intended to mean, namely, that an obligation in form joint must be so treated unless there is direct proof, or there are facts warranting the inference, that the parties intended it should be joint and several. Appellant says in its reply brief: "We concede at once that the phraseology of the contracts and note show that the obligation is a joint obligation." But it is contended that "it appears from the transactions entered into between

the parties, coupled with section 1659 of the Civil Code," that the obligation is several as well as joint. We are unable to discover anything in the complaint from which an inference can be drawn that the parties intended to make the obligation several. On the contrary, the agreements are in terms joint, and in them it is stipulated that the note shall be joint, and the note is in terms joint. We can see no ground for indulging the presumption of the statute. The recital in the paper acknowledged by Mrs. Atwood long after the other agreements were entered into and the note was executed cannot change the purport of the note. In this same paper she confirmed the previous agreements and signed the note as we find it.

Mr. Pomeroy says: "When the liability is joint, all the persons upon whom it rests must be united as defendants in an action brought upon the contract. This rule is general and applies to undertakings, obligations, and promises of all possible descriptions." (Pomeroy's Code Remedies, sec. 271.)

In *Harrison v. McCormick*, 69 Cal. 616, it was said: "The rule is well settled that several persons contracting together with the same party for one and the same act shall be regarded as jointly and not as individually or separately liable, in the absence of any words to show that a distinct as well as entire liability was intended to fasten upon the promisors" (citing Civ. Code, secs. 1430, 1431); and it was also there said: "It is well settled that parties to a joint contract must all be made defendants." (Citing Code Civ. Proc., sec. 382.) The presumption stated in section 1659 of the Civil Code may be regarded in the nature of an exception to the rule, where the facts exist therein referred to. But, as we have seen, this presumption does not prevent the parties from entering into a joint obligation, nor does it apply where there is an express joint obligation in the absence of any facts to show a contrary intention.

The judgment should be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Harrison, J., Van Dyke, J., Garoutte, J.

[S. F. No. 1220. Department One.—July 19, 1900.]

CHARLES CARPY, Respondent, v. JAMES DOWDELL
et al., Appellants.

STATUTORY CONSTRUCTION—REASON AND INTENTION OF LAW CONTROLLING LETTER.—A statute may be construed contrary to its literal meaning when a literal construction would result in an absurdity or inconsistency; and the reason and intention of the lawgiver will control the strict letter of the law when to adhere to the strict letter would lead to injustice or absurdity.

ID.—CONSTRUCTION OF CODE—MOTION TO RETAX COSTS—FILING OF SECOND NOTICE.—Section 1033 of the Code of Civil Procedure, which provides that "a party dissatisfied with the costs claimed may, within five days after notice of the filing of the bill of costs, file a motion to have the same taxed by the court in which the judgment was rendered or by the judge thereof at chambers," is not to be construed literally so as to subvert the settled practice of serving and filing a written notice of the motion, specifying the objections to the cost bill and the time when the application to the court or judge will be made to correct or strike it out; and such practice is a substantial compliance with the statute.

ID.—CODE MAXIM—SUBSTANCE OF LAW PREFERRED TO FORM.—It is one of the maxims of the law, embodied in section 3528 of the Code of Civil Procedure, that the law respects form less than substance.

APPEAL from an order of the Superior Court of Napa County refusing to hear a motion to strike out a cost bill and certain items thereof. E. D. Ham, Judge.

The facts are stated in the opinion of the court.

Rodgers & Paterson, and F. E. Johnston, for Appellants.

Daniel Titus, for Respondent.

VAN DYKE, J.—This is an appeal from an order refusing to hear the motion of the defendants to tax the cost bill filed by the plaintiff. The defendants within the proper time served on the plaintiff a notice that they were dissatisfied with the cost bill filed by the plaintiff, and that they would move the court to strike out certain items therein, and to re-tax said costs. The hearing of the matter was continued

from time to time by stipulation of counsel, and on October 25, 1897, in open court, counsel for defendants applied orally to the court for an order as prayed for in the notice of motion to strike out and to tax said cost bill. Counsel for plaintiff thereupon objected to the reading of the notice of motion, or to the hearing of any application to tax costs, or to strike out the memorandum of costs, on the ground that no written motion had been presented or filed, and the court sustained the objection made by counsel for plaintiff on said ground.

The action of the court in refusing to act upon defendants' motion is based upon a literal construction of that portion of section 1033 of the Code of Civil Procedure which reads as follows: "A party dissatisfied with the costs claimed may, within five days after notice of the filing of the bill of costs, file a motion to have the same taxed by the court in which the judgment was rendered, or by the judge thereof at chambers." The practice, however, has been quite general, after a written notice of motion has been given of intention to strike out or to amend or retax a cost bill, to make the motion according to the notice before the court orally, and no good reason appears why a separate motion should be filed. A statute may be construed contrary to its literal meaning when a literal construction would result in an absurdity or inconsistency. (Sutherland on Statutory Construction, sec. 323; *Merced Bank v. Casaccia*, 103 Cal. 645.) In seeking the object which section 1033 of the Code of Civil Procedure was intended to accomplish, it may be proper to look at the law as it existed before this section was amended. The section, as found in the first edition of the codes of 1873 and 1874, is the same section 510 of the old practice act. As it then stood it did not provide for service of the memorandum of costs on the adverse party, and there was nothing providing the manner in which a party dissatisfied with the cost claimed might obtain relief. The practice, however, had been determined by the decisions of the courts. Thus, in *Meeker v. Harris*, 23 Cal. 286, it was said: "If they [the plaintiffs] have included in their bills of costs items to which they are not legally entitled, the remedy of the defendants is by motion to retax the costs and to strike out the objectionable items." But there was no time fixed within which the motion should be

made, nor where it should be made, whether before the court or the judge at chambers. This section of the code, however, was amended at the next session of the legislature by the act of March 24, 1874. By the amendment the time of filing the memorandum of costs was enlarged from two to five days; a provision for the service of the memorandum of costs upon the adverse party was added, and a final paragraph prescribing how relief might be had against the insertion of improper items in the memorandum was enacted as a new provision. It was new, however, only in the sense of being a provision provided by statute, because, as already shown, the remedy to retax was in existence under the practice as defined by the court. All that was new was in fixing a definite time within which the motion should be made, and a provision that it might be made either before the court or in chambers.

The reason and intention of the lawgiver will control the strict letter of the law in interpreting the same, when to adhere to the strict letter would lead to injustice or absurdity. [The substance of the law as it stands is that the party who is dissatisfied with the bill of costs as filed must within a certain time make his objection known and the grounds on which he will move the court to correct or strike out the cost bill. When this is done by the proper notice in writing, served and filed, specifying the time when the application to the court or judge will be made, the object of the law would seem to have been complied with, and no useful purpose would be subserved by requiring the motion to be committed to writing instead of being made orally to the court or judge in the usual manner. It is one of the maxims of the law that it respects form less than substance. (Civ. Code, sec. 3528.)

We think the court below erred in refusing to hear the motion to retax the costs on the ground that said motion was not made in writing, and the order to that effect is reversed.

Harrison, J., Garoutte, J., concurred.

[L. A. No. 635. Department One.—July 19, 1900.]

**SAN JOSE LAND & WATER COMPANY et al., Appellants
v. LYMAN ALLEN et al., Respondents.**

DISMISSAL OF ACTION—WANT OF PROSECUTION—DISCRETION.—Where an action to set aside a judgment and to obtain a new trial was commenced in 1890, and a demurrer was sustained to the complaint in 1894, and no proceeding was had thereafter by the plaintiff until 1897, when an amended complaint was filed, the court had discretion to dismiss it for want of prosecution.

ID.—ABSENCE OF NOTICE OF ORDER SUSTAINING DEMURRER—DUTY OF PLAINTIFF.—The absence of notice given by the defendant to the plaintiff of the order sustaining the demurrer to the complaint and granting leave to amend, and the effect of such absence upon the running of the time in which to amend, under section 476 of the Code of Civil Procedure, cannot affect the right of the defendant to move for a dismissal for plaintiff's failure to prosecute the case or excuse plaintiff's laches. It was the duty of the plaintiff to see that the demurrer was determined, so that the action could go forward.

ID.—ORDER GRANTING LEAVE TO AMEND—ESTOPPEL—RIGHTS OF DEFENDANTS.—The court was not precluded from exercising its discretion on the motion of defendants to dismiss the case for want of prosecution, because it had shortly before given plaintiff leave to amend. The rights of the defendants could not be cut off by such leave alone.

APPEAL from a judgment of the Superior Court of Los Angeles County. W. H. Clark, Judge.

The facts are stated in the opinion.

Anderson, Fitzgerald & Anderson, Anderson & Anderson

and R. Dunnigan, for Appellants.

J. S. Chapman, for Respondents.

CHIPMAN, C.—Motion to dismiss the action and judgment of dismissal thereon, from which plaintiffs appeal. The complaint was filed August 29, 1890 the object of the action being to have the judgment referred to in the complaint set aside and to have the court grant the water company plaintiff herein, a new trial. On April 2, 1891, defendants appeared

by general demurrer. The hearing of the demurrer was continued from time to time and was finally argued and submitted, and on January 3, 1894, the court made an order sustaining the demurrer and the order was entered in the minutes of the court. An entry of said order was also made on the register of actions in said cause on the same day as follows: "Jan. 3, demurrer sustained." A rule of court allowed ten days to amend pleadings demurred to after ruling thereon unless otherwise ordered by the court. On June 19, 1897, as appears from an affidavit of plaintiffs' attorney, leave was granted by the court to file an amendment to the complaint, which was filed June 21, 1897, and on June 29, 1897, defendants gave notice of a motion to dismiss said action and for time in which to plead to the amended complaint, after the motion should be ruled upon, which latter part of said motion was granted July 1, 1897. The motion was heard on the affidavit of J. S. Chapman, an attorney for defendants, and on the affidavits of two of plaintiffs' attorneys, and on the papers and records referred to in the affidavit of Mr. Chapman. The motion was argued and submitted on November 29, 1897, and taken under advisement, and having fully considered the matter, "the court did on the twenty-sixth day of February, 1898, duly make and enter and file its judgment dismissing said action upon the said motion of the defendants therein," neither of plaintiffs nor their attorneys being present at the time. The grounds of the motion were: Want of prosecution; that no proceeding had been taken by plaintiffs for more than three years; that the real attorney of the parties defendant is dead; that the firm of Chapman & Hendrick, the nominal attorneys of record, was dissolved more than two years prior to making the motion, and that the interest of both plaintiffs and defendants in the original subject of the action has been transferred to other parties. It appears from the affidavit of attorney Chapman that the facts support the grounds of the motion above stated. Richard Dunnigan, one of plaintiffs' attorneys, averred in an affidavit that this action is one of several actions similar in character that have been pending for several years, and that Mr. Chapman has been the attorney in said actions ever since their commencement; that no notice of the ruling on plaintiffs' demurrer was ever served on affiant or

any other attorney in the case, and affiant had no knowledge of the ruling until June 8, 1897, when he was served with a copy of a complaint brought by the San Dimas Land and Water Company against the plaintiffs in this action; he then caused the records to be searched, and found that the said demurrer had been sustained; that he at once took steps to obtain leave of court to amend said complaint, which leave, it is averred, was granted June, 1897, and the amendment was filed June 21, 1897; avers that it was plaintiffs' intention to prosecute the present suit diligently; and that it is plaintiffs' intention, should it lose in the trial of the cause in that (the lower) court, to appeal the cause to the supreme court; avers that plaintiffs have always been ready and willing to prosecute the case to final decision; that in selling and transferring its interest in the property plaintiffs supposed that it would be able to establish its right referred to in the litigation herein and avers that it is the interest of plaintiffs to establish said right, and believes that at the trial plaintiffs will establish said rights; that if affiant had been given notice that said demurrer was sustained he would have proceeded at once on behalf of plaintiffs herein to obtain leave to amend the complaint and prosecute said action. Plaintiffs' attorney, J. A. Anderson, makes affidavit that the statements made in the affidavit of attorney Dunnigan are true, except that he, Anderson, "may have heard of the overruling [means, no doubt, sustaining] of said demurrer a short time before June 8, 1897."

So far as we can discover, the principal reason offered for not proceeding with the case, after the demurrer was argued and submitted, is that plaintiffs had no notice that the demurrer had been sustained until June 8, 1897. The order was made January 3, 1894, nearly three years and a half before plaintiffs made any movement toward proceeding with the case, and was entered in the minutes of the court and in the register of actions. The demurrer was filed in 1891 and was not passed upon until in 1894, but hearing thereof had been continued from time to time, at whose motion does not appear. Plaintiffs' attorney states that had he known of the ruling he would have amended his complaint, thus conceding its insufficiency and that for over six years the case stood without a good complaint. It was held here to be the duty of the plaintiff upon the defendant's interposing a demurrer

to see that the demurrer was determined so that the action could go forward. (*Kubli v. Hawzett* 89 Cal. 638.) The pendency of a suit in this court involving a question similar to a question involved in an action pending in a trial court offers no excuse for delay in prosecuting such case in the trial court to await the decision of the question in this court. (*Simmons v. Keller*, 50 Cal. 38.) The rule is well established that the exercise of the power to dismiss an action for want of prosecution must necessarily rest in the discretion of the *nisi prius* court. (*National Bank v. Nason*, 115 Cal. 626.) The power of the court to dismiss under sections 581 and 582 of the Code of Civil Procedure has often been held to give the court a general discretion, although the ground of dismissal be not mentioned in those sections. (*People v. Jefferds*, 126 Cal. 296.)

We do not think the court was precluded from exercising its discretion on the motion to dismiss because it had shortly before the motion was made given plaintiffs leave to amend; the rights of defendants could not be cut off by such leave alone. We assume that the leave was given although the record shows no minute of the court to that effect, the fact appearing in the affidavit of plaintiffs' attorney. Appellant cites section 476 of the Code of Civil Procedure, which provides that when a demurrer is sustained or overruled, and time given to amend or answer, "the time given runs from the service of notice of the decision or order." This section relates only to the right to amend or answer, but does not affect, the right to move for a dismissal. The question must be decided on the facts relating to plaintiffs' failure to prosecute the case with due diligence, and in view of the facts as disclosed we cannot say the court abused its discretion. Respondent argues with some reason that the amendment of the complaint does not materially strengthen plaintiffs' case, and therefore the judgment did not injure plaintiffs. We do not think it necessary to examine that phase of the matter.

We advise that the judgment be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Harrison, J., Van Dyke, J., Garoutte, J.

Hearing in Bank denied.

[L. A. No. 720. In Bank.—July 19, 1900.]

**J. M. METHVIN, Respondent, v. FIDELITY MUTUAL
LIFE ASSOCIATION, etc., Appellant.**

LIFE INSURANCE—NONPAYMENT OF PREMIUM—FORFEITURE OF POLICY.—

A policy of life insurance which expressly provides that in case of nonpayment of the stipulated premium at the time fixed therein the policy shall be void, and all payments made thereunder forfeited, ceases to be effective in such case, at the option of the insurance company; and upon the death of the insured with an unpaid installment of premium, which is past due by the terms of the policy, no recovery can be had thereupon.

ID.—STIPULATED PAY-DAYS MUST CONTROL.—The pay-days stipulated for in the policy must control, no matter when the policy is delivered, and the advance premium paid. The time of payment fixed in the policy is of the essence of the contract, if a forfeiture is provided for upon nonpayment at the day appointed. Delinquency cannot be tolerated or redeemed, except at the option of the company.

ID.—DELIVERY OF POLICY AFTER ITS DATE—QUARTERLY PREMIUMS FROM DATE—PAYMENT ON DELIVERY—RECEIPT UNDER POLICY.—The fact that a policy which provided for an advance payment of a premium for the first quarter of a year from its date, and for each quarter of a year thereafter, was not delivered until more than one month after its date, and that the first payment on the policy was then made and receipted for, though effective for the first quarter, cannot have the effect to extend the operation of the first payment for a period of three months from the delivery of the policy, contrary to the terms of the policy, and contrary to a receipt given for the payment in accordance with those terms.

ID.—NONPAYMENT FOR SECOND QUARTER—DEATH OF INSURED WITHIN THREE MONTHS FROM FIRST PAYMENT.—The death of the insured after the lapse of the pay-day for the second quarter provided for in the policy, without payment therefor, as requested by the company, though occurring within three months after payment made for the first quarter, at the time of delivery of the policy, precludes a recovery thereupon.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial.
Waldo M. York, Judge.

The facts are stated in the opinion of the court.

R. L. Horton, for Appellant.

E. S. Pillsbury, and F. D. Madison, *Amici Curiae*, also
for Appellant.

McKinley & Graff, for Respondent.

VAN DYKE, J.—The defendant appeals from the judgment and from the order denying a new trial.

In support of its appeal it is contended on behalf of the appellant: 1. That some of the material findings of fact are unsupported by the evidence; 2. That the court erred in deducing erroneous conclusions from the facts found. The action is based upon a policy of life insurance. The policy recites that the said company in consideration of the application and the payment of a premium of twenty-four dollars and ninety-six cents "on or before the thirtieth day of July, October, January, and April in every year, for the period of twenty years from the date hereof, does hereby receive Theodore Robert of Los Angeles, county of Los Angeles, state of California, as a member of said association, and issues this policy of insurance and hereby promises to pay the sum of three thousand dollars to his wife, Ida Robert; . . . provided, any moneys required to be paid under this policy during the continuance of this contract must be actually paid when due to the said association, and no dues or premiums on this policy shall be considered paid unless a receipt shall be given therefor, signed by the president and treasurer, and countersigned by the agent or person to whom payment is made, as evidence of such payment to him; otherwise this policy shall be *ipso facto* null and void, and all moneys paid hereon, except as hereinafter provided, shall be forfeited to said association."

The said policy is signed at the company's office at Philadelphia, the thirtieth day of July, 1895, and provides: "The same shall not be binding until delivered during the lifetime and good health of the applicant and until the first payment due hereon has been made." The said policy together with a receipt for the first payment, signed by the president and treasurer of said defendant company at Philadelphia, were forwarded to the local agent at Los Angeles. This receipt,

produced in evidence by the plaintiff, is as follows: "Received from Theodule Robert of Los Angeles, Calif., owner of policy No. 060,809, \$24.96, in payment of quarterly dues, payable and due on the 30th day of July, 1895, which pays such dues up to the 30th day of October, 1895." This receipt was countersigned at Los Angeles on the third day of September, 1895, by Frank Lerch, agent.

The court finds that said policy of insurance was issued on the third day of September, 1895, and the premium paid on said policy was paid for the period of three months from the third day of September, 1895. This finding is not supported by the evidence, but is in direct conflict with it. The policy was executed, as appears on its face, July 30, 1895. Necessarily some little time must elapse between its execution in Philadelphia and delivery in Los Angeles, which both parties to the contract of course well understood; and without the provision contained in the policy that it would not be binding until delivered, the same result would have followed. "A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent." (Civ. Code, sec. 1626.) If it were not delivered until September 3d, the date when the receipt was countersigned by the local agent, that would not alter the case. The payments are expressly specified in the policy to be due and payable on or before the thirtieth day of July, October, January, and April every year. The first payment under the terms of the policy ran from the 30th of July to the 30th of October, and this payment was received and receipted for by the company, and therefore the company cannot complain that it was not paid before the time at which it was received. As further evidence that there could be no misunderstanding as to when the second payment became due under the terms of the policy, the receipt given to Robert for the first payment expressly declares that the same "pays such dues up to the thirtieth day of October, 1895." In addition to the plain declaration in the policy, and also in the receipt, as to the time when the payments are to be made, the evidence shows that Robert well understood the same. A notice was sent to him by the company through its local agent September 30, 1895, calling his attention to the quarterly premium stipulated in the policy,

which would become due October 30, 1895, and also a receipt executed in the usual form sent to the Merchants' National Bank in Los Angeles to be delivered to him on payment of such premium. The second premium not having been paid when due, October 30, 1895, the local agent called upon Robert in reference to the matter. He testified: "I went to see him with Mr. Morgan, a friend of mine, who was well acquainted with him, in order to induce Robert to reinstate the policy. I then asked him whether he was going to pay the premium that had now been past due for a few days. I called his attention to the fact that the receipt was still here and could be paid upon signing a health certificate. He said no, because the policy had been misrepresented to him. I then asked him to read the policy, and asked him what his objections to it were. It seems he thought that at the end of three years he would get the amount of paid-up interest that the policy expressed in cash. I explained to him in the presence of Mr. Morgan, and showed him how it would be utterly impossible for any company to pay that in cash at the end of so short a time; but at the end of twenty years he would have the cash that the premium provided for. He seemed to be satisfied with the policy then, and said he would reinstate it, but did not have the money at that time. He also called my attention to the fact that my agent, St. John, owed him something, some eight or ten dollars—in that neighborhood. I told him that St. John still had a commission interest in the policy, and if he paid the premium, I would hold St. John's money and I would allow him the amount he owed him. . . . He made no objection that his premium was not due at that time. After that I met him once on Spring street, I think, in front of the Wilson block. That was probably a few days before his death, and I spoke to him again. I said: 'Mr. Robert, you ought to reinstate that policy, because you don't know when you might need it.' He says: 'Why, look at me, I do not look as if I am going to die?' 'No,' I said, 'lots of strong and healthy men die. You had better come down with me. I will take your note and give you a chance to pay it off.' He said: 'You wait until the 1st of December.' Every time I approached him about it he said he would have some money and he probably would reinstate.

He made no objection at that time that his premium was not due." Mr. Morgan, who accompanied said agent, corroborates him in reference to the interview with Robert.

Mrs. Robert, after the death of her husband, supposed that the second premium, due October 30th, had been paid. She employed Blake & Doane as attorneys to correspond with the company in reference to a blank form upon which to make formal proof of death. Their letter was dated April 10, 1896, to which the president of the defendant company replied under date of April 22, 1896, that: "In the regular course of business notice was sent to the insured September 30, 1895, requesting him to make payment of the second quarterly premium to the Merchants' National Bank. The receipt for the same was sent to the Merchants' National Bank for collection, and was returned by said bank, no payment having been made. We understand an attempt was subsequently made by Mr. Lerch to induce Mr. Robert to make payment, execute a health certificate as required by the terms of the policy, etc. but he declined to do it. The policy does not only require and make it a condition precedent to recovery to show that the insured is dead, but also to show justice of claim."

Subsequently, it appears, Mrs. Robert employed other attorneys, to wit, Hanna & Davis, and on September 21, 1897, nearly a year and a half after the first correspondence by Blake & Doane, these new attorneys wrote to the company. In their letter they call attention to the letter written by Blake & Doane, and the answer thereto by the president of the defendant association, and say: "In this last letter you intimated that Mrs. Robert, the beneficiary under said policy, was not entitled to payment of the same by reason of the fact that Mr. Robert declined to make payment of the quarterly premium to the Merchants' National Bank. . . . This matter has recently been placed in our hands, having been taken out of the hands of Messrs. Blake & Doane, and we write to renew the request that you send us blank proofs, so that we make a proof as to the death of Mr. Robert, and we will say further that as a matter of fact Mr. Robert did pay the second quarterly premium which was due to the company,

although not to the Merchants' National Bank, but was paid to Mr. St. John, the soliciting agent for your company, who was also the agent and had authority to make collections for Mr. Lerch, your general agent here." The president of the company replied to this last letter under date of September 27, 1897, repeating substantially what he had written in the first letter, and that in consequence of the failure of Robert to pay the premium when due, the policy by its terms became null and void.

Up to this time, therefore, it was well understood that the first payment did not extend beyond the 30th of October, 1895, but shortly thereafter the plaintiff became the assignee of Mrs. Robert, and this suit was commenced. On the trial it was conceded that the second payment was not made, but it was contended that the payment of the first premium ran three months from the third day of September, instead of from July 30, 1895, as plainly declared both in the policy and the receipt for the first payment delivered with it.

McConnell v. Providence Sav. etc. Soc., 92 Fed. Rep. 769, decided by the circuit court of appeals of the sixth circuit, is very much like the case at bar. The policy there contained similar terms and conditions with the one here. It was dated April 27, 1893, but was not delivered, nor did it become effective, until May 9, 1893, the first quarterly premium being then paid. The next quarterly premium was payable, according to the policy, July 27, 1893. The insured did not pay the second premium, but died July 28th, one day thereafter. This shows a very extreme case, but the court there, speaking through Judge Taft, the other members of the court concurring, held: "There was a failure to pay a quarterly installment on the day fixed. As a consequence the policy became forfeited, and all liability thereon ceased."

Bryan v. National Life Assn. (R. I. 1899), 42 Atl. Rep. 513, was also a case very similar to the one under consideration. There an application had been made on the 18th of the month, and the policy had been issued on the 22d, requiring monthly premiums to be paid on the 15th of each month in advance. The court held that the pay-days specified in the policy must control, saying: "Payment being required in advance, the payment made at its issue would go until the next pay-day should come. The fact that this would be three

days less than a month does not affect the case, since payments, being part of a fixed total, were not payments for a month, but payments due on a particular day of a month." (See, also, *New York Life Ins. Co. v. McMasters*, 30 C. C. A. 532; 87 Fed. Rep. 63.) In this case an application was made to the company under date of December 12, 1893, and the policy was dated December 18, 1893. It was afterward delivered to the insured, and the premium paid on delivery. The policy provided that it should be void if the second premium was not paid within thirty days after December 12, 1894. This premium was not paid, and the insured died six days after his right under the policy had elapsed. The beneficiary filed a bill in equity to have the policy reformed, so that the second premium should be made payable on December 18th, one year from the date of the policy, instead of December 12th. This would have extended the validity of the policy for six days after it became void according to its terms, and would have covered the death of the insured. The court, however, held that the policy could not be reformed, that the rights of the insured had elapsed by failure to pay the premium on the day provided for in the policy, and that plaintiff could not recover upon the policy either at law or in equity.

The court might as well undertake to release the insured from the payment of premiums altogether as to relieve him from forfeiture of his policy in default of punctual payment. The company is as much entitled to the benefit of one stipulation as the other, because both are necessary to enable it to keep its own obligations. As said in *New York Life Ins. Co. v. Statham*, 93 U. S. 24: "All the authorities agree that the time for payment is material—is of the essence of the contract—and nonpayment at the day appointed involves absolute forfeiture when, as in the present case, such are the express terms of the contract." And again it is said: "Promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of premiums when due, but upon compounding interest upon them. It is upon this

basis that they are enabled to offer insurance at the favorable rates they do. Forfeiture for nonpayment is a necessary means of protecting themselves from embarrassment. Delinquency cannot be tolerated or redeemed except at the option of the company." (See, also, Cook on Life Insurance, 174; Bliss on Life Insurance, 273.)

The policy in this case became void prior to the death of Robert for nonpayment of the premium as stipulated. The finding of the court that Theodule Robert and Ida Robert duly performed all the conditions of said policy on their part to be performed and paid all amounts required to be paid thereunder to the defendant is contrary to the evidence; also the finding that the defendant did not deny its liability on said policy prior to the 27th of September, 1897. The evidence shows that it disputed its liability from the first, on the ground that the second payment had not been made as stipulated in the policy.

The judgment and order denying a new trial are reversed.

McFarland, J., Temple, J., Harrison, J., Garoutte, J., and Beatty, C. J., concurred.

[Crim. No. 590. In Bank.—July 19, 1900.]

THE PEOPLE, Respondent, v. GEORGE PUTMAN, Appellant.

CRIMINAL LAW—HOMICIDE—MOTION FOR CONTINUANCE.—Where it appears that the defendant, accused of murder, was allowed an opportunity to and did procure the attendance of witnesses, and was represented by two able counsel, appointed by the court, a motion for continuance based upon the absence of witnesses and the lack of sufficient counsel, upon an affidavit based upon information and belief, which contained no showing of diligence to procure the testimony specified, nor that the continuance was not sought for delay, and which stated that defendant's mother was endeavoring to negotiate for the services of an additional attorney, was properly denied.

ID.—ATTENDANCE OF WITNESS CONFINED IN STATE'S PRISON—DEPOSITIONS.—The court may order the attendance of witnesses who are confined in the state's prison, when it appears to the satisfaction

of the court that such attendance is necessary. But an order for such attendance does not issue as matter of right; and the court may, in its discretion, refuse to require the attendance of particular witnesses so confined, and may allow their depositions to be taken.

ID.—EVIDENCE—IMPEACHMENT OF WITNESS—CONVICTION OF FELONY—ANSWER OF QUESTION RULED OUT.—It is permissible to ask a witness who has been convicted of felony the nature of the felony of which he has been convicted. Where the witness answers such a question, although the objection thereto is sustained by the court, if the answer is not stricken out, the defendant is not injured.

ID.—IRRELEVANT REMARKS OF DISTRICT ATTORNEY—INSTRUCTIONS.—Remarks made by the district attorney outside of the issues, which were objected to by the defendant, and which the jury were especially instructed by the court to disregard, and which did not reach a course of proceeding militating against justice and the fair and orderly conduct of the cause, are not ground of error.

ID.—INSTRUCTION—TESTIMONY OF CONVICT WITNESSES.—An instruction that the jury were not arbitrarily to reject the testimony of convict witnesses simply because they were convicts, but that their testimony should be considered and weighed in accordance with the rules of evidence, does not in effect tell the jury to disregard the fact that they had been convicted of a felony in weighing their testimony.

ID.—ASSUMPTIONS OF FACT IN INSTRUCTIONS—HOMICIDE.—Instructions may assume facts admitted or proved without the shadow of a conflict of evidence; and where there is no dispute or question of the fact of the homicide, it is not a charge as to a matter of fact to refer to it in an instruction.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order denying a new trial. J. W. Hughes, Judge.

The facts are stated in the opinion of the court.

Frank S. Sprague, Charles C. Holl, and Edward C. Harrison, for Appellant.

Tirey L. Ford, Attorney General, and C. N. Post, Assistant Attorney General, for Respondent.

VAN DYKE, J.—Defendant was informed against by the district attorney of Sacramento county for the crime of murder, and was tried and convicted of murder in the first degree. He thereupon moved for a new trial, which was de-

nied, and he was sentenced to death by hanging. From the judgment and order overruling his motion for a new trial the defendant prosecutes this appeal.

The evidence discloses that the defendant was a convict in the state prison at Folsom; that on May 15, 1889, within the prison walls, defendant walked past a fellow-convict named Showers, who was sitting on a doorstep, wheeled around, grasped Showers by the chin with his left hand, pulled his head around, and stabbed him six times with a knife, from the effects of which Showers died within a few minutes thereafter.

The first point made on the part of the appellant is that the court erred in overruling the defendant's motion for a continuance of the trial. The motion is based on affidavits of one of defendant's counsel. Pretty much everthing stated in the affidavit was upon information and belief. The grounds for a continuance were: 1. Absence of witnesses; and 2. Lack of sufficient counsel. The names of the witnesses, except as to one Abe Majors, are not given, and it is stated that said Majors was a convict and to be executed within ten days from the date of the affidavit, and his testimony was sought to be procured for the purpose of refuting an anticipated theory of the prosecution. There was no showing of diligence in the affidavit, nor that the continuance was not sought for mere delay. With reference to obtaining additional counsel the affidavit sets forth that defendant's mother was endeavoring to negotiate for the serviecs of an attorney other than the two appointed by the court to defend the appellant. The affidavit was clearly insufficient on both of the grounds, and it was not an abuse of discretion on the part of the trial court to deny the motion. Besides, it appears that the defendant was zealously and ably defended by the counsel who represented him. and was allowed an opportunity to, and did, procure the attendance of witnesses. The cause was set down for trial on June 5, 1899, and prior thereto the court permitted the defendant to withdraw his plea of not guilty in order to file an objection to the sufficiency of the information. The court having overruled the objection to the sufficiency of the information, and the defendant having again entered his plea of not guilty, moved the court to continue the cause to some

other date than the 5th of June, which motion was denied, and this is assigned as error. It is not shown, nor does it appear, that the defendant was prejudiced in any way by the ruling of the court in refusing to postpone the trial, and it is apparent that he was not so prejudiced. The defendant made application to have thirteen convicts, some of them under sentence of death and confined in the state prison at Folsom, brought to Sacramento to testify in his behalf. Upon the showing made the court granted the application as to six of the parties mentioned in the affidavit, and ordered that the deposition of the other seven be taken at the prison.

This question was fully considered in *Willard v. Superior Court*, 82 Cal. 456. It was there held that the order for the production of such witnesses does not issue as a matter of right. It issues only when it appears to the satisfaction of the trial court that the witness is necessary. The statute has lodged in the court the right to determine whether the witness is necessary. In the concurring opinion of Chief Justice Beatty he says: "I feel very sure, however, that it does not mean, and that it never was intended, that on the mere demand of a defendant in a criminal action, any convict, or any number of convicts, must be transported from the state prison to the place of trial as an essential prerequisite to proceeding with the trial. It is not possible that the court or judge to whom application is made has no discretion to examine the sufficiency of the grounds upon which it is based, and to deny it, if, in his opinion, it ought to be denied."

In *People v. Willard*, 92 Cal. 486, in reference to this same matter, it is said: "We feel that this is a privilege extended to persons accused of crime which is capable of gross abuse unless strictly guarded and we do not wish to be understood as holding that the order should be made except upon a very strict showing, and upon previous notice to the state of the application, but when such notice has been given and a case of apparent necessity is made out—or, in other words, when the materiality of the evidence and its importance is clearly and satisfactorily shown, and the good faith of the defendant making the application also appears—the court should, in the

exercise of its discretion, make the order for the attendance of the prisoner as a witness."

In the case under consideration it is quite apparent that the action of the court was not at all prejudicial, inasmuch as the defendant was allowed to take the depositions of the witnesses named who were not ordered produced at the trial, thereby giving him the benefit of the testimony of all those named in his application.

Under the rule laid down in this court in *People v. Chin Hane*, 108 Cal. 607, it is permissible to ask a witness the nature of the felony of which he has been convicted; although an objection to such a question asked by the defense of the witness James was sustained, yet the witness answered the question and the answer was not stricken out; therefore the defendant was not injured by the ruling. The same may be said in reference to the question asked of the witness Rodgers. Error is assigned in reference to the remarks made by the district attorney in his argument to the jury. Possibly some of the matters touched upon by the district attorney may be said to be outside of the issues, but the court instructed the jury specially not to regard any of the statements that were objected to by the defendant. Counsel's conduct must reach a course of proceeding militating against justice and the fair and orderly conduct which should characterize a judicial proceeding in criminal cases before error can be predicated on it. (*People v. Ward*, 105 Cal. 340; *People v. Wong Chuey*, 117 Cal. 630.) Error is assigned as to an instruction given in reference to convict testimony, and it is contended by appellant's counsel that the instruction in effect told the jury that they were to disregard the fact that certain witnesses had been convicted of a felony in weighing their testimony. The instruction will not bear the interpretation put upon it by appellant. It was, in substance, that the jury were not to arbitrarily reject the testimony of the convict witnesses simply because they were convicts, but that their testimony should be considered and weighed in accordance with the rules of evidence. Error is assigned in the giving of certain charges by the court at the request of the prosecution, on the ground that such charges are in respect to matters of fact, and are therefore prohibited by the constitution. (Const., art. VI, sec. 19.) An instruction which assumes a

fact as proved will not warrant a reversal if the fact is admitted, or there is no shadow of conflict of evidence with respect to it. The matter of fact referred to by the trial court here was the commission of the homicide, about which there seems to have been no dispute or question at the time the instructions were given. (*People v. Messersmith*, 61 Cal. 249; *People v. Phillips*, 70 Cal. 61; *People v. Lee Sare Bo*, 72 Cal. 623.)

The court did not err in refusing at the defendant's request to give certain instructions with reference to a preponderance of evidence. Other instructions bearing upon that question, free from the objections of defendant's instructions, were given.

An examination of the record shows that the instructions as a whole, as well as the entire course of the trial, were as fair and favorable to the defendant as the case would justify.

Judgment and order affirmed.

McFarland, J., Harrison, J., and Garoutte, J., concurred.

[L. A. No. 632. Department One.—July 20, 1900.]

FARMERS' EXCHANGE BANK OF SAN BERNARDINO, Respondent, v. ALTURA GOLD MILL AND MINING COMPANY et al., Defendants. C. E. MAUD and G. O. NEWMAN, Appellants.

PROMISSORY NOTE—INDORSEMENT—WAIVER OF DEMAND, PROTEST, AND NOTICE—WORDS STAMPED ON NOTE—JOINT AND SEVERAL CONTRACT—PRESUMPTIONS.—The words, "For value received, I hereby waive demand and notice of demand, protest, and notice of protest and nonpayment," when not written over the name of the first indorser of a promissory note by himself, but printed upon the back of the note with a rubber stamp before any of the names of a number of required accommodation indorsers were written thereupon, are not limited to the first of such indorsers, but must be deemed a part of the note, and, notwithstanding the use of the singular number, must be presumed to be the joint and several contract of all of the indorsers, who must be presumed to have read the words and to have adopted them as their contract; and the bank dis-

counting the note, whose president had affixed the stamp, had a right to assume, on return of the note thus signed, that each and every indorser was severally bound by the waiver.

ID.—EVIDENCE—INTENTION OF INDORSER IMMATERIAL.—Evidence of the intention of an indorser not to waive presentation or notice, who is found on sufficient proof to have attached his signature under the stamped waiver, is not admissible, and, if admitted without objection, is irrelevant and immaterial, and cannot affect or change his liability.

ID.—ACTION UPON LOST NOTE—TENDER OF INDEMNITY BOND—OFFER IN COMPLAINT—FILING—SERVICE—COSTS.—Where an indemnity bond against a lost note is not tendered before suit, but is offered in the complaint and filed with it, it must be deemed tendered when the complaint is served upon the defendant, and if defendant then offers to pay or to let judgment be taken, plaintiff cannot recover costs; but if the defendant persists in making defense to the action, and plaintiff recovers, he should recover all costs thereafter accruing.

ID.—UNSUCCESSFUL DEFENSE—RECOVERY OF COSTS—INSUFFICIENT RECORD UPON APPEAL.—Where the action upon the lost note was unsuccessfully defended after tender of an indemnity bond in the complaint, and the record upon appeal does not show what costs had accrued at the time the bond was filed, or when it was tendered, the judgment for costs will not be disturbed upon appeal.

APPEAL from a judgment of the Superior Court of San Bernardino County. Frank F. Oster, Judge.

The facts are stated in the opinion.

E. B. Stanton, and John G. North, for Appellants.

A surety cannot be held beyond the express terms of his contract (Civ. Code, sec. 2836), and the waiver in the singular number over the name of the first indorser is his contract only. (*Central Bank v. Davis*, 19 Pick. 373; 2 Daniel on Negotiable Instruments, 4th ed., sec. 1109; Tiedeman on Commercial Paper, sec. 363.) There can be no waiver without an intent to waive, and such intention of subsequent indorsers was properly disproved. (*San Bernardino etc. Co. v. Merrill*, 108 Cal. 494.) The evidence of intention was received without objection, and must have full weight. (Civ. Code, sec. 1036; *Newberry v. Lee*, 3 Hill, 523.) There can be no recovery of costs because the indemnity bond was not tendered before suit. (*Randolph v. Harris*, 28 Cal. 562.¹)

F. W. Gregg, for Respondent.

"A promise made in the singular number, but executed by several persons, is presumed to be joint and several." (Civ. Code, sec. 1660.) A printed waiver is part of the note, and binds every name indorsed on the paper, unless some special indorser expressly excepts himself from the provisions of the waiver. (Randolph on Commercial Paper, sec. 106; *Smith v. Pickham*, 8 Tex. Civ. App. 326; *Iowa Valley State Bank v. Sigstad*, 96 Iowa, 491; *Farmers' Exchange Bank v. Ewing*, 78 Ky. 264²; *Polo Mfg. Co. v. Parr*, 8 Neb. 379³; *Portsmouth Sav. Bank v. Wilson*, 5 App. D. C. 8; *Phillips v. Dippo*, 93 Iowa, 354⁴; *Hull v. Myers*, 90 Ga. 674.) A written contract of waiver may bind more than one indorser. (*Parshley v. Heath*, 69 Me. 90⁵.) Evidence of the intention of an indorser is wholly inadmissible, and irrelevant and immaterial. (3 Randolph on Commercial Paper, sec. 1364.) To escape liability for costs defendant should have made an offer of judgment. (Code Civ. Proc., secs. 997, 1025, 2074.) The costs should be awarded or apportioned according to the equity of the case. (*Randolph v. Harris*, 28 Cal. 566, 567.⁶)

CHIPMAN, C.—Action on promissory note for five hundred dollars, dated July 1, 1895, and payable six months after date, executed by defendant Hutson to defendant the mining company, and sold to plaintiff before its maturity. Plaintiff had judgment, from which defendants Maud and Newman appeal and come here on bill of exceptions. It appears that plaintiffs sent the note to the Orange Growers' Bank of Riverside for collection; the latter bank subsequently remailed it to plaintiff bank, and it was stolen from the United States postoffice and never after recovered. The form of the note and its indorsements were proved by parol as a lost instrument.

1. The principal question is whether by the indorsement on the note appellants "expressly waived all rights to demand notice of payment, protest, and notice of protest, and

² 39 Am. Rep. 231.

³ 30 Am. Rep. 830.

⁴ 57 Am. St. Rep. 254.

⁵ 31 Am. Rep. 246.

⁶ 87 Am. Dec. 139.

nonpayment of said note," as found by the court. It appeared from the evidence that defendant Hutson made the note payable to the mining company; that defendant Otis, president of the company, requested plaintiff to discount it for the purpose of raising funds for the company; plaintiff consented to do so on condition that Otis would procure the indorsement of three or four persons, stockholders of the company, whose financial standing had been inquired into; Otis agreed to get the indorsements, whereupon the president of plaintiff bank stamped at the top of the back of the note with the rubber stamp used in the bank for that purpose an impression in red ink reading as follows: "For value received, I hereby waive demand and notice of demand, protest, and notice of protest, and nonpayment." Defendant Otis testified that the note was indorsed by the company and that he took it and procured the other indorsements. It was also testified that the signatures on the back of the note were as follows:

"Geo. E. Otis, }	Oct. 1st, 1895.
"C. E. Maud, }	
"A. P. Morse,	Oct. 3d, 1895.
"T. W. Duckworth,	Oct. 4th, 1895.
"G. O. Newman,	Oct. 8th, 1895."

The note was then taken to plaintiff by Otis and delivered on October 11th, and the face of the note and the accumulated interest paid him by plaintiff, and the money was passed to the credit of the mining company, which it appeared kept its account with plaintiff, and was checked out in due course.

Defendant Otis, on behalf of plaintiff, testified: "I distinctly remember a waiver of demand, notice, and nonpayment at the end of the note," and he stated the circumstances which impressed the fact upon his memory. He further testified: "The stamp was affixed above the indorsements of all the indorsers upon the note. It was on the back of the note and at one extremity of it, and the indorsements were underneath that and were made after the stamp was affixed." This evidence was fully corroborated by the testimony of Mr. Drew, the president of plaintiff bank, who remembered dis-

tinctly having placed the stamp on the back of the note and at its top before handing it to Mr. Otis. He also instructed Mr. Otis to have the date given by each indorser when he signed, which it seems was done. Other witnesses also corroborated this evidence.

Appellant Maud testified: "Judge Otis presented me the note signed by Mr. Hutson, and he appended his signature and I appended mine. There was at that time no waiver of protest or indorsement of any kind on the note. Nothing was said about my waiving presentation or notice of protest or demand. When I indorsed my name on the note I did not intend to waive presentation or notice. When I signed my name there was no waiver at all attached to the note." Appellant Newman was not quite so positive, but he testified: "I am pretty sure there was not anything else on the back of the note. I surely haven't the least recollection that anything of that kind was on the note," referring to the waiver. Later in his examination he expressed himself as positive that there was no rubber stamp impression on the note when he signed it. It is not the province of this court to decide which of these witnesses gave the facts as they existed; that duty devolved upon the trial court, and its finding, the conflict in the evidence being so obvious, is conclusive upon us. We do not think that the statement of appellant Maud that he did not intend to waive presentation or notice can change his liability. The court having found on sufficient evidence that the indorsement was there when he attached his signature, the intention of the indorser cannot be received as changing the effect of the indorsement. The evidence was inadmissible, but being admitted without objection it still was irrelevant and immaterial. (2 Randolph on Commercial Paper, sec. 1364.) Besides, as the court was convinced that the witness Maud was mistaken in one important fact testified to by him, the court had the right to reject the statement as to his intention. If the waiver was there when Otis signed, so also must it have been there when Maud signed, for the latter testified that they signed at the same time, and the date is the same.

It seems to me that there is no room for controversy except as to the single proposition advanced by appellants, that the waiver was, in legal effect, the waiver of Otis only. It is con-

tended that because the waiver was expressed in the singular number it is the contract only of the one who first wrote his name thereunder and that subsequent signatures were mere blank indorsements. Appellants rely upon *Central Bank v. Davis*, 19 Pick. 273. The indorsement on the back of the note in that case was as follows:

"Waiving right to notice.

"MOSES ROBERTS.

"JOSEPH DAVIS."

It was held that the waiver was that of Roberts alone and that the signature of Davis was a blank indorsement. This case has been frequently referred to by authors and courts as correctly stating the rule of law on the subject. But to understand the rule intended to be there laid down, some regard must be paid to the facts of that case. The note in question was a renewal note, the first note and its renewal being the note of one Baker payable to one Moses Roberts or order. Defendant Davis had received the money on the first note, and plaintiff agreed to renew it for Baker if he would get the name of defendant Davis. This was done, and the first note was delivered to Baker, who absconded insolvent, and hence the suit against Davis. He averred in his answer that the indorsement of the name of Roberts, the payee, was a forgery, which plaintiffs denied, but the court held that each party was left to the legal presumption in his favor on that point. The court said: "In the decision of the case we must act upon the assumption that the first indorsement is valid, as it is implied by law to be genuine, and no proof is admissible to show the contrary." The court held that defendant was estopped from denying the genuineness of the signatures of the antecedent parties because plaintiffs derived their title through him; and plaintiffs could not show the forgery and have their remedy for the consideration paid because their title came by Roberts' indorsement and they did not buy the note from defendant nor did they pay the consideration to him. Such is not the situation here. The stamped form of waiver was placed upon the back of the note before any person indorsed it and was not placed there by any of the indorsers; the note was given to Otis to be signed by the indorsers thus stamped, and the court found that each of them

placed his signature under the waiver just as it left the plaintiff's hands. That the waiver reads in the singular number cannot, under the circumstances of this case, compel the enforcement of the rule on which appellants rely. If it was the promise of all who signed, it is presumed to be joint and several. (Civ. Code, sec. 1660.) Mr. Daniels says: "The words or acts constituting a waiver must, of course, be those of the person entitled to require that the regular steps of demand, protest, and notice shall be taken; for it would be a solecism to permit one person to waive away the rights of another. Therefore, if one indorser write a waiver over his name, it does not affect another." (Citing *Central Bank v. Davis*, *supra*; 2 Daniel on Negotiable Instruments, 4th ed., sec. 1109.) Mr. Tiedeman in his work on Commercial Paper, at section 363, says: "If the waiver is made by one of the indorsers in writing, over his signature, it constitutes simply the personal waiver of that indorser, and is not binding upon the other indorsers, who do not become a party to the waiver," also citing the Massachusetts case, as also does Mr. Morse in his treatise on Banks and Banking, third edition, volume 1, page 26. We must assume, however, that these authors in deducing the rule, on the authority in part of the case cited, did so in view of the all-important fact that the waiver was indorsed on the back of the note by the payee's own hand and signed by him; and, proof to the contrary being inadmissible, the waiver necessarily became the several act of Roberts, and Davis' indorsement was in blank, over which the holder had no right to insert a contract of waiver. But in the case here the waiver was not so placed; it was stamped plainly in colored ink, and the first indorser in the order of the signatures was not the payee, nor did he place the waiver there; he was an accommodation indorser like the rest of them, and signed as they did for the benefit of the mining company of which he and they were stockholders. The plaintiff had a right to assume, on the return of the note thus signed, that each and every of the indorsers was severally bound by the waiver. This view of the matter might be strengthened by reference to the distinction made when the waiver is printed on the back of the note, and not written

by the payee or by the first indorser. Mr. Randolph speaks of a printed waiver on the back of a note as part of the note itself (Randolph on Commercial Paper, sec. 106); and Mr. Daniel says that "the purport of the instrument is not only to be collected from the four corners, but from the eight corners; the memorandum on the back affecting its operation being regarded the same as written on its face."

This rule is thus stated in 4 American and English Encyclopedia of Law, second edition, page 456: "If the indorsement containing the waiver is placed on the instrument at the time of execution or before indorsement, it must be regarded as part of the original instrument as much as if it had been written on the face thereof, and the rule as stated in regard to the parties affected by a waiver embodied in the instrument will apply," and in a footnote it is said: "Finding this printed formula on the back of the note, and placing their signatures with reference to it, the indorsers must be presumed to have seen and read the words, and to have adopted them as their contract."

2. It is claimed that the item of forty-five dollars and fifty-five cents costs was improperly allowed because no indemnity bond was tendered before the suit was begun. (Citing *Randolph v. Harris*, 28 Cal. 562.⁷) The complaint alleged "that plaintiff has tendered herewith and has duly filed with the clerk of this court a full and sufficient bond," etc. The court found the fact substantially as alleged in the complaint, and the evidence supports the finding. The only question is whether the filing the bond with the clerk of the court contemporaneously with the filing of the complaint, of which fact the service of the complaint gave defendants notice, was sufficient.

In *Randolph v. Harris*, *supra*, plaintiff offered in his complaint to indemnify defendant, and before the trial filed a bond with the clerk and at the trial tendered the same to defendant, who refused to accept it because insufficiently stamped and because it had not been tendered before suit. The objection as to the stamps was cured on the spot, which left only the other objection, there being no objection to the

form of the bond or its sufficiency as security. The court, by Sanderson, J., said: "The proper course to pursue in such cases is for the plaintiff to prepare and tender before suit a reasonable indemnity. If it be refused he can then sue, alleging the tender and refusal, and keep the tender good by filing the bond in court. If, at the trial, the court shall be of the opinion that the indemnity is reasonable and sufficient, he will be entitled to judgment with costs. But he may sue and offer in his complaint to give such indemnity as the court may adjudge reasonable, and upon complying with the order in that respect take his judgment, but without costs." This course was recommended on the authority of certain English cases cited in the opinion, and on the assumption that the case was to be treated as one of equitable cognizance because a suit at common law cannot be maintained in such a case but resort must be had to a court of chancery, which always decrees indemnity against all future claims upon the maker or acceptor of the promissory note. The court further said: "In this case, as before stated, there is no averment of a previous tender, and, but for the fact that such tender seems to have been waived by the defendant, we should be compelled to reverse the judgment so far as the allowance of costs is concerned. We think, however, that the allowance of costs was correct in view of that fact."

I do not find that the point has been before this court since *Randolph v. Harris*, *supra*, and no later case is cited. The waiver referred to in the opinion arose from testimony given by the plaintiff that "he offered an indemnity bond before the suit was commenced, and that the defendant made some remark that amounted to a waiver of such bond." The waiver, therefore, did not spring from the fact that the defendant defended against the action. The opinion of Judge Sanderson certainly holds that although the question of costs is left in such cases to the discretion of the court, it would nevertheless be error to allow costs to the plaintiff unless he had previously to the suit tendered indemnity or indemnity had been previously waived. It will be observed, however, that the decision went off on the fact of waiver, and while the proper course to pursue in these cases is as suggested

in the opinion, it was not necessary to the decision to hold that costs should not be allowed unless there had been a previous tender of indemnity. The purpose of the bond is to protect the defendant against a possible action by some innocent holder of the lost paper, should it afterward be sued upon. The bond is the equivalent for the surrender and cancellation of the paper at the trial to which the defendant is entitled. Except as to the question of costs it does not concern the defendant whether the bond be furnished at the trial or before suit commenced. In the latter case he would have an opportunity to discharge the debt and save all costs; in the former he would have an opportunity to avoid future costs by tendering payment and would be entitled to costs accrued up to that time. I cannot see how any injury is visited upon the defendant in the one case more than in the other, except as to costs accrued when the tender is made. The filing of the bond at the time the complaint is filed and averment of the fact in the complaint, of which defendant has notice as soon as he is served, it seems to me should be regarded as a tender of indemnity at that time, and if the defendant then offers to pay or let judgment be taken against him he should be relieved from all costs then accrued. But if he persists in making a defense to the action he should be held for costs thereafter accruing. It seems to me that this view of the matter is clearly within the spirit of section 475 of the Code of Civil Procedure, which directs the court "to disregard any error . . . in the pleadings or proceedings which, in the opinion of the court, does not affect the substantial rights of the parties." In the case here the record does not show what costs had accrued at the time the bond was filed or when it was tendered. We have no means of ascertaining what, if any, costs should be deducted as having accrued when the bond was tendered.

We advise that the judgment be affirmed.

Cooper, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Van Dyke, J., Harrison, J., Garoutte, J.

[L. A. No. 728. Department One.—July 20, 1900.]

**SAN DIEGO INVESTMENT COMPANY, Respondent, v.
V. E. SHAW, Appellant.**

**STREET ASSESSMENT—PROCEEDINGS IN INVITUM—COMPLIANCE WITH
STATUTE ESSENTIAL.**—Proceedings upon which a street assessment
are based are *in invitum*, and the statute must be substantially
complied with, or the assessment will be void.

**ID.—COST OF GRADING STREET—VOID ASSESSMENT UPON LOTS ON ONE
SIDE OF STREET.**—The city authorities have no power to assess the
entire cost of grading a street upon the lots on one side thereof
if the street upon which the work was done was not a subdivision,
street, avenue, or lane, and the work was not done opposite work
of the same class already done; and such an assessment is void.

ID.—CONSTRUCTION OF STATUTE—LANDS FRONTING ON WORK.—The pro-
vision of the statute that "the expenses incurred for any work
authorized by this act . . . shall be assessed upon the lots and
lands fronting thereon," means that the expense of the whole work
authorized by the act in the improvement of a public street shall
be assessed upon all of the lands fronting on the work, on both
sides of the street, regardless of whether more of the work of
grading is done on the one side of the street than on the other.
The public improvement, when made, is equally for the benefit of
each and every lot abutting on the street.

APPEAL from a judgment of the Superior Court of San
Diego County and from an order denying a new trial. J. W.
Hughes, Judge.

The facts are stated in the opinion.

Victor E. Shaw, for Appellant.

Collier & Collier, for Respondent.

COOPER, C.—Action to enforce a street assessment lien.
Plaintiff recovered judgment, and defendant has appealed
from the judgment and from an order denying his motion
for a new trial.

The common council of the city of San Diego ordered that
the portion of Fourth street, on the east side of the center line
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thereof, from the south side of Ivy street to the south side of University avenue, be graded to the official grade. There are seventeen blocks on each side of the portion of Fourth street so ordered to be graded. These blocks are subdivided into lots, there being one hundred and thirty-two lots fronting on said street on the east side thereof and a like number on the west side. The total cost of the grading was six thousand eight hundred and thirty-eight dollars and thirty-two cents, and the whole thereof was apportioned and assessed against the lots fronting on the east side of the street.

Defendant was the owner of one of the lots on the said east side, and the assessment against his lot was fifty-one dollars and twenty-two cents, being the amount with which it is sought to charge the lot in this action. Whether or not the judgment is correct depends upon the validity of the assessment so made. Did the city authorities have any power to assess the entire cost of grading the street upon the lots on one side thereof? The act of 1885 (Stats. 1885, p. 147) commonly called the Vrooman act, as amended March 31, 1891 (Stats. 1891, p. 196), provides—Section 2: "Whenever the public interest or convenience may require, the city council is hereby authorized and empowered to order the whole, or any portion, either in length or width of the streets . . . of any such city graded or regraded to the official grade." Section 7, subdivision 1: "The expenses incurred for any work authorized by this act . . . shall be assessed upon the lots and lands fronting thereon except as hereinafter specifically provided; each lot or portion of a lot being separately assessed, in proportion to the frontage at a rate per front foot sufficient to cover the total expense of the work." Subdivision 7: "Where a subdivision street . . . terminates in another street, . . . the expense of the work done on one-half of the width of the subdivision street . . . opposite the termination shall be assessed upon the lot or lots fronting on such subdivision street . . . according to its frontage thereon, half way on either side respectively to the next street . . . or to the end of such street . . . if it does not meet another, and the other one-half of the width upon the lots fronting such termination." Subdivision 8: "Where any work mentioned in this act . . . is done on either or both sides of

the center line of any street for one block or less, and further work opposite to the work of the same class already done is ordered to be done to complete the unimproved portion of said street, the assessment to cover the total expenses of said work so ordered shall be made upon the lots or portions of the lots only fronting upon the portions of the work so ordered."

It is elementary that proceedings upon which a street assessment are based being *in invitum* the statute must be substantially complied with, or the assessments will be void.

The authority to levy the assessment in this case in the manner in which it was levied is not found in the statute. Subdivision 1 of section 7 of the act expressly declares that the expenses incurred for any work authorized by the act shall be assessed upon the lots and lands fronting thereon except as otherwise specifically provided.

There are several specific provisions in the other subdivisions of section 7 as to the manner of making assessment in certain cases, but this case does not come within any of the specific provisions mentioned in the section. The street upon which the work was done was not a subdivision street, avenue, or lane, and the work was not done on one block or less, opposite work of the same class already done. Therefore, the only authority under which an assessment could have been made for the grading is subdivision 1 of section 7, and the expenses should have been assessed upon all the lots and lands fronting upon the street. It is claimed that the words "fronting thereon" refer to the work done, and not to the street on which all the lots on both sides front. The position is untenable. The act of April 1, 1872 (Stats. 1871-72, p. 804), contained a similar provision to the one under discussion. In the statute of 1872, section 8, subdivision 1, it was provided: "The expenses incurred for any work authorized by section 3 of this act shall be assessed upon the lots and lands fronting thereon except as hereinbefore specially provided, each lot or portion of lot being separately assessed in proportion to its frontage, at a rate per front foot sufficient to cover the total expense of the work."

In *Diggins v. Brown*, 76 Cal. 322, the same contention was made in regard to the language quoted from the act of 1872,

and this court said: "There is nothing in the language of the provision to indicate that such was the meaning of the legislature. The word 'thereon' must refer to the phrase 'any work authorized by section 3 of this act.' And the natural meaning of the words used is that the expense of the whole work shall be assessed (ratably) upon all the lands fronting on the work."

We think the construction given the correct one and conclusive of this case. The words "fronting thereon" refer to the "work authorized by this act," which in turn has reference to grading the streets to the official grade, as provided in section 2 of the act. In our opinion, this is not only the correct construction of the statute, but it is the right method of making the assessment. The principle upon which assessments are made for grading or improving streets is that the improvement will add to the convenience of all persons residing upon each side of such street, and thus enhance the value of the property fronting upon the street so improved in proportion to its frontage thereon. The expense of grading a street may from many causes be much greater on one side of the center line than on the other, or for the same reasons it may be much greater in front of one lot than in front of another of the same width, but the public improvement when made is equally for the benefit of each and every lot abutting on the street. If the lots on the east side of the street can be compelled to pay the entire cost of grading to the center thereof, then the street on the west side may never be improved, or the lots fronting thereon required to contribute to any portion of the grading. One side of a street might be graded one year, and the grading of the other side delayed for years. The owners of the lots on the side unimproved could use the improved side of the street without having paid a cent toward such improvement. Or it might be that owing to the nature and formation of the land that the east side of the street would cost several times as much to grade as the west side. The street when graded would increase the value of the lots on each side equally.

It follows that the judgment and order should be reversed and the court below directed to dismiss the action.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed and the court below directed to dismiss the action.

Harrison, J., Van Dyke, J., Garoutte, J.

[Sac. No. 636. Department One.—July 20, 1900.]

LAST CHANCE WATER DITCH COMPANY, Respondent, v. EMIGRANT DITCH COMPANY, Appellant.

VENUE OF ACTION—DIVERSION OF WATER—DITCH IN TWO COUNTIES—INJURY TO REAL PROPERTY—INJUNCTION.—The right of the owner of a ditch situated in two counties to have water flow therein is coextensive with its right to the ditch; and a diversion of water therefrom in one of the counties is an injury to the real property of the owner in the other county. An action to enjoin such diversion is properly brought in either county.

ID.—CHANGE OF PLACE OF TRIAL—PLACE OF BUSINESS OF CORPORATION DEFENDANT—DIVERSION IN ANOTHER COUNTY.—The fact that the defendant in an action to enjoin the diversion of water from a ditch situated partly within the county of the venue is a corporation having its principal place of business in another county, in which the ditch is also situated, and that it diverted and used the water in that county, cannot entitle the defendant to a change of the place of trial of the action to that county.

ID.—PLEADING—AVERMENT OF DAMAGE UNNECESSARY.—In an action to enjoin the diversion of water from plaintiff's ditch, it is not necessary to aver that plaintiff has already sustained any damage, nor to state the amount thereof.

APPEAL from an order of the Superior Court of Kings County refusing to change the place of trial. Dixon L. Phillips, Judge.

The facts are stated in the opinion of the court.

L. L. Cory, and Stanton L. Carter, for Appellant.

Bradley & Farnsworth, Rowen Irwin, and Short & Irwin, for Respondents.

HARRISON, J.—Appeal from an order denying a motion to change the place of trial. Plaintiff is the proprietor of a water ditch, situate partly in Fresno county and partly in

Kings county, through and by means of which it takes and supplies to its stockholders water which it has appropriated from Kings river for the irrigation of their lands situated along the line of the ditch. In 1894 the defendant constructed a canal known as the Fowler Switch canal, about thirty-two miles above the head of the plaintiff's ditch, through which it diverted a certain quantity of water from Kings river, and afterward constructed a dam in the channel of the river just below the head of said canal, by means of which it has, since April, 1898, diverted all the water flowing in the channel of the river at the head of the canal, and prevented the water from entering the plaintiff's ditch, and thereby deprived it of the waters of the river to which it is entitled and threatens to continue such diversion of the water. The plaintiff brought this action in the county of Kings to enjoin the defendant from thus interfering with the natural flow of the water. The defendant has its office and principal place of business in the county of Fresno, and the point at which the defendant constructed the dam and diverted the water from Kings river is also within the county of Fresno, and the water diverted by defendant was used for irrigating lands within the county of Fresno. Upon an affidavit setting forth these facts the defendant moved the court to have the action transferred for trial to the county of Fresno. The motion was denied, and the defendant has appealed.

The case falls directly within the principles declared in *Lower Kings etc. Ditch Co. v. Kings River etc. Canal Co.*, 60 Cal. 408, in which it was held that plaintiff's right to have water flow in the ditch is coextensive with its right to the ditch, and that, although the act of diverting the water was committed in Fresno county, it was an injury to that portion of its ditch which was in Tulare county, and that the action was properly brought in the latter county. In *Drinkhouse v. Spring Valley Water Works*, 80 Cal. 308, it was held that a suit for an injunction to restrain the defendant from building a dam which, when completed, would permanently flood the plaintiff's land was a suit for an injury to real property, and under section 392 of the Code of Civil Procedure the county in which was situated the property that would be injured was the proper place for its trial, even though the action did not seek for damages. The right of the plaintiff to maintain the

action without averring that it had already sustained any damage, or the amount thereof, is clear. (*Moore v. Clear Lake Water Works*, 68 Cal. 146.)

The order is affirmed.

Van Dyke, J., and Garoutte, J., concurred.

[S. F. No. 1318. Department One.—July 20, 1900.]

LOTTIE CAMERON et al., Respondents, v. ARCATA AND
MAD RIVER RAILROAD COMPANY, Appellant.

BILL OF EXCEPTIONS—SETTLEMENT AFTER DEFAULT—JURISDICTION—EXCUSE NOT APPEARING—APPEAL.—A judge is without jurisdiction to settle a bill of exceptions presented after the time allowed by law if it fails to disclose any excuse for the delay, or any facts from which the appellant could claim relief from his default, or that he applied therefor. A bill of exceptions so settled cannot be considered upon appeal.

Id.—EXTENSION OF TIME—LIMITS OF POWER.—A judge cannot grant an extension of time to present a bill of exceptions, exceeding in the aggregate a period of thirty days, without the consent of the opposite party. He cannot grant two or more extensions of thirty days each, nor can he grant an extension of time after the moving party has made default.

APPEAL from a judgment of the Superior Court of Humboldt County and from an order denying a new trial. E. W. Wilson, Judge.

The facts are stated in the opinion of the court.

S. M. Buck, F. A. Cutler, Chamberlin & Wheeler, and George D. Murray, for Appellant.

Sevier & Selvage, for Respondents.

HARRISON, J.—The plaintiffs are the surviving widow and infant child of Alexander D. Cameron, deceased, and recovered judgment herein against the defendant in the sum of ten thousand dollars damages for the death of the deceased, resulting from the negligence of the defendant. From

this judgment and an order denying a new trial the defendant has appealed, bringing the case here upon the judgment-roll and a bill of exceptions. The respondents insist that the appellant is not entitled to have the bill of exceptions considered, for the reason that it was not prepared or served upon them within the time provided by the statute, and that the judge had no jurisdiction to settle the same.

The verdict of the jury was rendered September 3, 1897, and judgment thereon was entered upon the next day. September 10th the defendant served upon the plaintiffs, and filed with the clerk, its notice of intention to move for a new trial. The defendant did not serve upon the plaintiffs its proposed bill of exceptions until October 29th, and the plaintiffs then objected thereto upon the ground that the same was served too late. November 8th the plaintiffs, reserving an objection to the proposed bill of exceptions that it was served too late, proposed amendments thereto, and when the same was presented to the judge for settlement again objected to its settlement upon the same ground. It was shown, at that time, and appears from the bill of exceptions itself, that on September 4th the court extended the defendant's time thirty days within which to prepare and serve its proposed bill of exceptions and that on October 4th the court extended the time for preparing and serving said bill for thirty days further. Each of these extensions was made upon the *ex parte* application of the defendant, and without the consent of the plaintiffs, and it also appears that the plaintiffs did not at any time stipulate or consent to any extension of time for the preparation and serving of any bill of exceptions. The judge overruled and disallowed the objection of the plaintiffs, and settled and signed the bill, and the same was then filed.

Section 1054 of the Code of Civil Procedure provides: "When an act to be done as provided in this code relates to . . . the preparation of statements or of bills of exception, or of amendments thereto, the time allowed by this code may be extended upon good cause shown by the judge of the superior court in and for the county in which the action is pending, or by the judge who presided at the trial of said action; but such extension shall not exceed thirty days without the con-

sent of the adverse party." Under section 650 of the Code of Civil Procedure the defendant was entitled to ten days after September 4th—the day upon which the judgment was entered—within which to prepare and serve its draft of a bill of exceptions. The order of September 4th "extending" the time for thirty days should be considered as giving to the defendant that time in addition to the ten days allowed by this section, and would therefore expire October 14th. The notice of its intention to move for a new trial was given September 10th, and as it was stated in this notice that the motion would be made "upon a bill of exceptions to be settled and filed herein," under section 659 (2) of the Code of Civil Procedure the defendant would have ten days from that date within which to prepare and serve such bill. The time thus authorized expired September 20th, and, although under section 1054 the judge would then have been authorized to extend the time for preparing and serving a proposed bill for thirty days, such extension was not granted or sought—the defendant doubtless acting upon the theory that the extension granted by the order of September 4th had not yet expired. Unless, therefore, the defendant should prepare and serve a draft of the bill on or before October 14th, the judge was not authorized to settle it. The order of October 4th extending the time for thirty days thereafter was not available to the defendant in any view that can be taken of the proceeding. The court had exhausted its power to extend the time for preparing the bill to be used on an appeal from the judgment, and the time within which it might make an order extending the time for preparing and serving the proposed bill under the notice of intention to move for a new trial expired September 20th. Even if we could hold that the order of October 4th could be construed as extending the time for thirty days after September 20th it would not be available to the defendant, as the draft of his bill was not prepared or served until October 29th.

The suggestion of the appellant that section 1054 is to be construed as declaring that the court cannot grant an extension of more than thirty days at any one time, but that it may make several extensions of thirty days each, and thus extend the time for more than thirty days, is not only con-

trary to previous decisions of this court (*Bryan v. Maume*, 28 Cal. 238; *Bunnel v. Stockton*, 83 Cal. 319), but is also in direct violation of the language of the section, which declares in express terms that "such extension"—that is, whatever extension may be made by the court—shall not exceed thirty days without the consent of the adverse party. "The judge of the court exhausted his power when he extended the time thirty days, and the last extension of time by him was unauthorized." (*Bunnel v. Stockton*, *supra*.) The provision in section 650 of the Code of Civil Procedure that the draft of the bill may be prepared and served within ten days after the entry of judgment, "or such further time as the court in which the action is pending, or a judge thereof, may allow," does not authorize the court to grant an indefinite extension of time for the preparation and serving of the draft, but it is to be read in connection with the restriction in section 1054 upon the amount of time which may be allowed by the court.

Nor can we accede to the proposition of the appellant that, as the judge has settled the statement, it must be considered here that there were sufficient reasons presented to him to excuse the defendant's failure to serve the draft within the time allowed therefor, and that such determination is conclusive in this court. It is a sufficient answer to this contention to say that it does not appear that any attempt was made on the part of the defendant before the superior court to excuse his delay, or that any such determination was made by the judge. The record itself fails to show any facts from which the appellant could claim relief from his default, or that he made any application to the court to obtain such relief. In *Stonesifer v. Kilburn*, 94 Cal. 33, and in *Banta v. Siller*, 121 Cal. 414, cited by the appellant, application was formally made to the superior court, under section 473, to be relieved from the default in presenting the bill, but in the present case no such application was made, the defendant apparently relying upon the extension of October 4th, which, as we have seen, was unauthorized.

It must be held, therefore, that the judge was without jurisdiction to settle the bill of exceptions when it was presented to him, and it follows that it cannot be considered upon this

appeal. (*Connor v. Southern Cal. etc. Co.*, 101 Cal. 429; *Henry v. Merguire*, 106 Cal. 142.)

The judgment and order denying a new trial are affirmed.

Van Dyke, J., and Garoutte, J., concurred.

Hearing in Bank denied.

[S. F. No. 1446. Department One.—July 20, 1900.]

SAMUEL NEWMAN, Appellant, v. ADA M. FREITAS et al., Respondents.

SPECIFIC PERFORMANCE—INADEQUACY OF CONSIDERATION.—Under section 3391 of the Code of Civil Procedure, inadequacy of consideration is made a distinct ground for refusing a specific performance of a contract, independently of the question whether it amounts to evidence of fraud.

ID.—CONTINGENT FEE OF ATTORNEY IN DIVORCE SUIT—SHARE OF COMMUNITY PROPERTY—INADEQUATE CONSIDERATION—REASONABLE COMPENSATION.—A contract for a contingent fee of an attorney in a divorce suit, giving one-third interest in the share of community property recovered by the wife as plaintiff, cannot be specifically enforced, where it appears that the plaintiff did not receive adequate consideration for her promise, and that the attorney received, by order of the court in the divorce suit, a reasonable compensation for all the services performed by him.

ID.—PRESUMPTION FROM ALLOWANCE BY ORDER OF COURT—KNOWLEDGE OF CONTRACT—INVALIDITY.—It must be presumed from the allowance made for the services of the attorney for the plaintiff in the divorce suit, by order of the court, with knowledge of the written contract for a contingent fee, that the court deemed the contract illegal and void, and made the allowance as if no contract had existed. Otherwise, the allowance could not be justified.

ID.—JUSTICE AND REASONABLENESS OF CONTRACT—RULES OF EQUITY.—Under section 3391 of the Civil Code, specific performance cannot be enforced against a party to a contract "if it is not as to him just and reasonable." Under the settled rules of equity, specific performance cannot be decreed unless it affirmatively appears that the contract is fair, just, and equal in all of its parts, and reasonable and equal in its operation; and if it is in any respect unfair or oppressive, the plaintiff will be left to his remedy at law.

ID.—DIVORCE—CONTRACT FOR CONTINGENT FEE AGAINST PUBLIC POLICY.

A contract between an attorney and the plaintiff in a divorce suit for a contingent fee is against the policy of the law, and contrary to good morals. The law does not favor divorce; and any collateral bargaining promotive of it is unlawful and void, whether made by the parties with each other, or by one of the parties with an attorney whose benefit depends upon procuring the divorce.

ID.—REASON OF RULE AS TO CONTINGENT FEES—CESSATION OF RULE IN

DIVORCE CASES—POWER OF COURT.—The reason of the rule allowing attorneys to contract for contingent fees in civil cases, for the protection of persons unable to pay a certain fee for a meritorious cause of action or defense, does not apply to contracts with the wife in a divorce suit, in which the court may require the husband to pay the wife's expense for prosecuting or defending the action. The reason or necessity for the rule ceasing in such cases, the rule itself also ceases therein.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Robert Y. Hayne, for Appellant.

Rodgers, Paterson & Slack, and Henry K. Mitchell, for Ada M. Freitas, Respondent.

Shortridge, Beatty & Brittain, and Delmas & Shortridge, for Manuel T. Freitas, Respondent.

VAN DYKE, J.—The appellant, as plaintiff, sues as assignee of a contract for contingent fees in a divorce suit. The contract in question is as follows:

"I hereby retain and employ J. H. Long, Esq., as my attorney, to act for me in all matters arising or growing out of any divorce proceedings or separation with my husband, M. T. Freitas, or in regard to the settlement of my community property rights, or to act for me in regard to any settlement, compromise, or any other disposition of any agreement or settlement which may take place between myself and my said husband.

"I am about to commence proceedings for absolute divorce or separation, and, whereas, I desire to secure my proper proportion of the community property, I hereby empower and authorize the said J. H. Long to do whatever he may see fit

in the premises in connection with said divorce or separation and obtaining of my portion of the community property, and I hereby agree to pay to the said J. H. Long one-third (1-3) of all amounts recovered or received by me by reason of said or any action commenced in my behalf, or by reason of any settlement, compromise, compact, or agreement, or in fine, by any reason whatsoever.

"Provided, first, however, that no compromise or agreement can take place or be had in the premises without first obtaining the written consent of said parties hereto, and I further agree in no event to substitute any attorney in the place of said Long in said matters.

"In witness whereof, the said parties hereto have hereunto set their hands and seals this 24th day of October, 1893.

"ADA M. FREITAS.

"J. H. LONG."

The court below found that the said James H. Long, one of the parties to the contract, at the time of making the same, was an attorney at law, admitted to practice only in the superior court in and for the city and county of San Francisco, and never had been admitted to practice in the supreme court of the state; that under said contract said Long commenced an action in the superior court in and for said city and county of San Francisco, in the name of said Ada M. Freitas against her husband, Manuel T. Freitas, for a divorce and a division of the common property; that he conducted the proceedings in said action during the period of about fifteen months, mostly in taking testimony before the commissioner to whom the cause had been referred for that purpose, and the taking of such testimony consisted of twenty-four hearings before said commissioner. The testimony so taken consisted of twelve hundred and seventy-nine typewritten pages of ordinary size, and at the end of said period, about April, 1895, the plaintiff in said action, Ada M. Freitas, became dissatisfied with her attorney and with the consent of said attorney employed Messrs. Delmas & Shortridge, who were thenceforth associated with said Long, in said cause; that thereafter the said Long in conjunction with said Shortridge of said firm, drafted an amended complaint in said cause; and thereafter

participated in two hearings before said commissioner in the taking of testimony, but that he did not participate in any further hearing before said commissioner; that during the month of June, 1893, the cause was argued in the superior court by said Shortridge on the testimony taken before said commissioner, and said Long did not participate in said argument, and did not know that said cause was set down for argument, or that any argument was made therein, until everything was concluded and the compromise made, but that he never refused to render any services requested of him in the cause; that some eighteen months after Delmas & Shortridge were associated in the case, and when the decree of divorce had been granted, a compromise as to the property rights was arranged between the plaintiff and defendant in said action; that by the terms of said compromise the defendant in said action conveyed and transferred to the plaintiff therein two pieces of real estate situated in the city and county of San Francisco, alleged to be of the value of ten thousand dollars, household furniture, including a piano, of the value of fifteen hundred dollars and upward, and the sum of sixteen hundred dollars in cash; that she was decreed fifty dollars per month as permanent alimony; and that during the pendency of the divorce case, by order of the court, said Long received as counsel fees the sum of eleven hundred dollars from the defendant in said action, but it is found that this order was made with knowledge of the existence of the written contract in question for a contingent fee. It is also found that said Long, although not admitted to the supreme court, was at all times a reputable attorney and competent to prosecute or manage any action before the superior court, and that he did not negligently or otherwise abandon the case of the defendant, Ada M. Freitas, in the said superior court; that said Long, on or about the 20th of July, 1894, executed and delivered to the plaintiff an assignment and transfer of said contract between him and said Ada M. Freitas. Upon these facts the court found as a conclusion of law that the plaintiff was not entitled to recover in said action, and ordered judgment accordingly in favor of the defendants. An appeal is taken from the judgment so entered and comes up on the judgment-roll.

The contention on behalf of the appellant is that upon the facts found by the court the judgment should have gone for the plaintiff. The judgment, however, is sustainable upon several grounds and for various reasons.

1. This is not an action at law to recover upon the contract, or for damages for a breach of the same, but is a case in equity for a specific performance of the contract in question. "Specific performance cannot be enforced against a party to a contract in any of the following cases: 1. If he has not received an adequate consideration for the contract; 2. If it is not as to him just and reasonable." (Civ. Code, sec. 3391.) In *Morrill v. Everson*, 77 Cal. 114, it is held that, while there was a consideration sufficient to support the contract at law, yet there was no adequate consideration, and that consequently a court of equity would not specifically enforce it; that, although before the code the preponderance of authority was that the mere inadequacy of consideration, not amounting to evidence of fraud, was not ground for refusing specific performance, yet that under the provisions of the code inadequacy of consideration is made a distinct ground for refusing specific performance. Mrs. Freitas did not receive an adequate consideration for her promise, and Long was fully compensated for the services he performed. It appeared there were twenty-four hearings which he attended before the commissioner in taking testimony, and that all the testimony taken was twelve hundred and seventy-nine typewritten pages, or about fifty pages at a session, which would not be a very hard day's work, to say the least. But at the rate the services were performed the compensation received amounted to nearly fifty dollars per day. It is found that the court, in making the allowance to Mrs. Freitas as compensation for Long as her attorney, knew of the existence of the contract. The inference, therefore, is that the court held the contract to be illegal and void. Otherwise the allowance was made squarely in the teeth of several decisions by this court. (*Sharon v. Sharon*, 75 Cal. 1, 42; *Reynolds v. Reynolds*, 7 Cal. 176; *White v. White*, 86 Cal. 212.) In the Sharon case there was a contract for a contingent fee, as in this case, and the court, without deciding whether such an agreement was valid and enforceable, says: "Conceding that the agreement cannot be enforced, in case, as the final result

of litigation, the plaintiff shall realize a share or portion of the community property, the agreement was a fact which should have influenced the action of the court below. If it had appeared at the hearing of the motion that Mr. Tyler, actuated solely by a desire to vindicate justice and the good name of the plaintiff, had promised to prosecute the action without compensation, that he was fully competent and had prosecuted it, the circumstances would show that she had no necessity for money to pay counsel. The question is not whether, as between the parties, counsel ought to be paid, but whether the wife has need of money to prosecute her action. . . . If counsel had abandoned her cause, it might, perhaps, have been necessary for the court to provide the plaintiff means for securing legal assistance." It is fair to presume, therefore, that as the court below understood the matter, the allowance made to Long as the attorney of Mrs. Freitas was made as if no contract had existed. At any rate, it was a reasonable compensation for the services he had performed. In *Cooper v. Pena*, 21 Cal. 403, it is said: "Before the court will act, it must be satisfied that the contract is reasonable and equal in its operation. The rule, as stated by Chancellor Kent, is that unless the court be satisfied that the contract is fair and just and equal in all its parts, and founded on an adequate consideration, it will not by the interposition of its extraordinary power order it to be executed." In *Agard v. Valencia*, 39 Cal. 292, it is said: "Another well-established rule in courts of equity is that in a suit for a specific performance it must be affirmatively shown that the contract is fair and just, and that it would not be inequitable to enforce it. The court will not lend its aid to enforce a contract which is in any respect unfair or savors of oppression, but in such cases will leave the party to his remedy at law." (See, also, *Bruck v. Tucker*, 42 Cal. 346; *Sturgis v. Galindo*, 59 Cal. 281; *Kelly v. Central Pac. R. R. Co.*, 74 Cal. 557²; *Mathews v. Davis*, 102 Cal. 204.)

The plaintiff in this action seeks to recover not only one-third of the real and personal property and money payment,

¹ 43 Am. Rep. 239.

² 5 Am. St. Rep. 470.

but also one-third of the allowance for permanent support ordered to be paid by the husband to the wife in the divorce suit, and asks that this court decree accordingly, and that said Manuel T. Freitas be ordered to pay over to the plaintiff the one-third of the fifty dollars per month, as the same becomes due. Aside from the objection that a specific performance should not be decreed in this case as to the permanent alimony, or rather support, and the personal property in question, Long having received a fair compensation for all the services he rendered to the plaintiff in the divorce suit, his assignee of the contract standing in no better position than he would, it would not only be inequitable, but unreasonable and unjust, to decree a specific performance in his favor.

2. But there is an objection to the enforcement of the contract more radical than the one just considered. The contract is, in its nature, against the policy of the law and contrary to good morals. The law does not favor divorce, and permits it only for approved causes and on sentence from duly established public authority. Therefore, any agreement for divorce, or any collateral bargaining promotive of it, is considered unlawful and void. (2 Bishop on Marriage, Divorce, and Separation, sec. 696; Greenwood on Public Policy, 490.) Under our code either husband or wife may enter into any agreement or transaction with the other, or with any other person, respecting property, which either might if unmarried. (Civ. Code, sec. 158.) Notwithstanding this freedom to enter into any contract between themselves or with other persons, it has been held in this state repeatedly that an agreement between husband and wife founded upon consideration to withdraw or abandon a defense to a suit for divorce, or do anything to facilitate procuring the same, is illegal and void. (*Beard v. Beard*, 65 Cal. 354; *Senter v. Senter*, 70 Cal. 619; *Loveren v. Loveren*, 106 Cal. 509.) In the latter case the following from *Phillips v. Thorp*, 10 Or. 494, is quoted with approval: "The authorities are uniform in holding that any contract between the parties having for its object the dissolution of the marriage contract, or facilitating that result, such as an agreement by the defendant in a pending action for divorce to withdraw his or her opposition, to make no defense, is void as *contra bonos mores*."

The courts of other states have expressed themselves similarly in reference to such contracts. In *Hamilton v. Hamilton*, 89 Ill. 349, it is said: "The majority of the court, however, are of opinion that the contract set out in the declaration is in its essence and character against public policy and it must be held invalid upon that ground. While divorces are authorized by law, they ought not to be encouraged. In this contract there is no express agreement that the husband would not resist the application for a divorce, or that he would consent to a divorce, still it is thought that to permit such a contract as this to be enforced in the courts would open the door for the attainment of divorces by collusion, and upon this ground the decision of the court in sustaining the demurrer to the declaration ought to be sustained."

In *Muckenburg v. Holler*, 29 Ind. 139,³ the court say: "The special contract for the payment of two hundred dollars was contrary to the policy of the law. It was so framed as to have effect only on condition that a divorce should be granted. Its direct tendency was to influence the present plaintiff in procuring a divorce or in overcoming resistance to an effort by his wife directed to that end. The marriage relation is not thus to be tampered with, and the courts, by contracts of the parties, converted into mere registers of their agreement for separation from the bonds of matrimony. The law favors marriage, and cannot, therefore, sanction contracts intended to promote its dissolution by lending itself to their enforcement. We know of no case in the books in which such an appeal to any court to compel the fulfillment of such a contract or to award damages for its breach has been successfully made."

In *Schmieding v. Doellner*, 10 Mo. App. 373, it is said: "That any agreement entered into between husband and wife pending a suit for divorce, or in contemplation of such a suit, whose force and effect are in any way made dependent upon the result of the suit, will be held void because of the motive or inducement which it offers for either a passive consent or active aid in promoting the consummation of a divorce. There may be no direct evidence of collusion for that specific purpose. It is sufficient to vitiate the agreement if it be so framed that in order to an enjoyment of its benefits by one

³ 92 Am. Dec. 345.

party or the other a decree must supervene. The law will sustain no act whose tendency, whether such be its purpose or not, is toward promoting dissolution of marriage."

The principle recognized in these and other like authorities applies with equal force to a contract between the wife and an attorney, where, as in the case of this contract, the enjoyment of its benefits by one party, to wit, the attorney, depends upon procuring the divorce. Several cases have been before this court in which there were contracts similar to the one under consideration; for instance, *Reynolds v. Reynolds, supra*, *Sharon v. Sharon, supra*, and *White v. White, supra*. In none, however, was it necessary to determine the question whether or not such a contract between a married woman and an attorney in contemplation of divorce proceedings by which the attorney was to receive a share of what was recovered, was lawful. In at least one of these cases, however, it was intimated that such contract was considered invalid.

But in some of the other states the question has been directly decided adversely to such contract. *Jordan v. Westerman*, 62 Mich. 170,⁴ was such a case. There the plaintiff, on the day she commenced the proceeding against her husband for divorce, entered into a written contract with defendants, who were attorneys, by which she retained them to prosecute the suit, and to pay the defendants, as compensation for their services and costs which they were to advance, whatever sum the husband should be compelled to pay by the court or otherwise. The husband by himself and counsel endeavored to effect a settlement and reconciliation, but the defendants as plaintiff's counsel resisted such efforts until the husband paid over to them as costs, alimony, and expenses the sum of four thousand five hundred dollars. The divorce was obtained and the defendants paid to the plaintiff half of the sum received, and retained the balance under the terms of their contract. The plaintiff brought the suit in question to recover the balance of the money paid over by the husband to defendants. The supreme court of Michigan, in passing upon the contract in question says: "Such contracts are against public policy for another reason. Public policy is interested in

⁴ 4 Am. St. Rep. 836.

maintaining the family relation. The interests of society require that those relations shall not be lightly severed, and that families shall not be broken up for inadequate causes or from unworthy motives; and where differences have arisen which threaten disruption, public welfare and the good of society demand a reconciliation, if practicable or possible. Contracts like the one in question tend directly to prevent such reconciliation, and if legal and valid, tend directly to bring about alienation of husband and wife, by offering a strong inducement, amounting to a premium, to induce and advise the dissolution of the marriage ties as a method of obtaining relief from real or fancied grievances, which otherwise would pass unnoticed."

Contracts for contingent fees paid attorneys were not tolerated at all at common law, but in this and perhaps most of the states such contracts are allowed, if not favored. This is on the ground that otherwise a party, without the means to employ an attorney and pay his fee certain, and having a meritorious cause of action or defense, would find himself powerless to protect his rights. In divorce cases, however, the law has taken care that the wife shall not be without assistance in proper cases either to prosecute or defend such actions. The court in its discretion may require the husband to pay as alimony any money necessary to enable the wife not only to support herself, but also to prosecute or defend the action, and is given ample power to enforce such order. The reason or necessity therefor does not exist in such cases as in the others for allowing contingent attorneys' fees, and where the reason ceases the rule or law also ceases.

By the contract in question the attorney was to have a portion of or an interest in the community property to be recovered, and a division of the community property could take place only upon a dissolution of the marriage. (Civ. Code, sec. 146.) This prospective share in the community property, being the greater interest, was the controlling consideration on the part of Long. Hence, he was directly and greatly interested, not only in preventing any reconciliation, but in bringing about a divorce. As he assigned this contract before the same had been performed on his part, the plaintiff also

became interested with him. By a process of assignments this interest might be extended as the exigencies of the case might require, so as to include many persons of means and influence who would lend their assistance in the accomplishment of the same purpose; in other words, create a brokerage and form a syndicate in the business of contingent divorce contracts. We think the policy of the law is against all contracts, of the kind; that they should be held illegal and void, and that the courts should refuse to aid their enforcement.

Judgment affirmed.

Harrison, J., and Garoutte, J., concurred.

[Sac. No. 571. Department One.—July 20, 1900.]

CHARLES SHIVELY, Appellant, v. EUREKA TELLURIUM GOLD MINING COMPANY, Defendant. Mrs. B. C. NORTHRUPP, Intervenor, Respondent.

ACTION AGAINST CORPORATION—INTEREST OF PRESIDENT AND DIRECTORS—ADMISSIONS OF ANSWER—INTERVENTION BY STOCKHOLDER.—In an action brought against a corporation by an assignee for the use of the president and two directors thereof, constituting a majority of the board, in which the answer of the corporation admits all the causes of action alleged, a stockholder may intervene to assert the rights of the corporation against the plaintiff, and need not aver a request to the corporation officers to defend the action.

ID.—COUNTERCLAIM FOR UNPAID ASSESSMENTS—ADMISSIONS OF CORPORATION—INSUFFICIENT PLEADING AND FINDINGS.—Under a counterclaim in the complaint in intervention for indebtedness of the plaintiff's assignors to the corporation for unpaid assessments on stock held by them, the admissions made in the answer of the corporation cannot sustain a finding against the plaintiff, where there was no evidence of the assessment found; and where there is no allegation or finding of the facts necessary under the provisions of the Civil Code to create a personal liability on the stockholders for the alleged assessment, the counterclaim cannot be sustained.

ID.—AVERMENTS OF FRAUDULENT CONSPIRACY—ABSENCE OF FINDINGS.—Where the complaint in intervention makes averments that the suit

was brought for the use and benefit of the president and two directors of the corporation defendant, and that the claims sued upon were concocted in pursuance of a conspiracy to defraud the company of its mine and mining property, in the absence of findings disposing of the issues thus tendered. judgment cannot be rendered for the plaintiff upon the findings made in his favor.

APPEAL from a judgment of the Superior Court of Shasta County and from an order denying a new trial. John F. Ellison, Judge presiding.

The facts are stated in the opinion.

Isaacs & Tillotson, and Charles A. Garter, for Appellant.

Reddy, Campbell & Metson, and Ira D. Orton, for Intervenor, Respondent.

Dozier & Herzinger, for the Corporation, Defendant.

SMITH, C.—Appeal from a judgment against the plaintiff and from an order denying a new trial.

The suit was brought to recover various sums of money, set up in as many counts of the complaint, and aggregating twenty-eight thousand five hundred and twenty-eight dollars and forty-four cents. One of these counts was for a small amount alleged to be due on a promissory note made by the defendant corporation to the plaintiff; the others, for various claims against the company assigned to plaintiff by Ludlum, one of its directors. Of the assigned claims some were for claims originally held by Ludlum, others for claims assigned to him—one by one Reid for a small amount, another by Jones, a director of the company, and the others by Swezey, also a director.

These claims were all expressly admitted in the answer of the defendant corporation, but disputed by the intervenor, by whom it is in effect alleged that the suit was brought for the use and benefit of Ludlum, Swezey, and Jones, and that the claims sued upon were concocted by them in pursuance of a conspiracy to defraud the company of its mine and mining property. And it was further alleged by the intervenor—by way of counterclaim in favor of the defendant—that Ludlum and Swezey, prior to the assignments of their respective claims

against the company, became indebted to the company each in the sum of twenty thousand nine hundred and eighty-seven dollars, on account of assessments levied on stock held by them. The intervenor's interest in the controversy—as appears from the allegations of the complaint—was simply that of a stockholder.

The court found for the plaintiff on each of the causes of action set up in the complaint, except the fourth, on which the finding was against the plaintiff, and the sixth, where the claim was reduced from five thousand eight hundred and fifty dollars to two thousand two hundred and sixty-four dollars; the aggregate amount thus found for the plaintiff being fifteen thousand nine hundred and sixty-nine dollars and ten cents.

But the court also found upon the issues raised by the counterclaim that Ludlum and Swezey, prior to their respective assignments, were indebted to the company on account of assessments on stock held by them, each in the sum of twenty thousand dollars; and, as conclusion of law, that the intervenor was entitled to judgment that plaintiff take nothing by his action, and for costs.

It is claimed on behalf of appellant that it appears affirmatively from the findings that there was no indebtedness from Ludlum and Swezey to the company on account of the counterclaim alleged and found, and hence that he is entitled to judgment on the findings for the amount found to be due to his assignors; or, failing this, that he is at least entitled to a new trial on account of the insufficiency of the evidence to justify the findings as to counterclaim, and of those findings to sustain the judgment; and also because the intervenor was not entitled to intervene.

On the last point the case presented by the complaint in intervention—disregarding the allegations as to fraudulent conspiracy—is that of a suit brought against the corporation defendant for the use of the president and two directors, constituting a majority of the board, and in which the plaintiff's causes of action were all admitted in the answer. In such a case there can be no doubt of the right of a stockholder to intervene; nor was it necessary to allege a request to the corporation officers to defend. (*Whitehead v. Sweet*, 126 Cal. 73, and authorities cited.)

With regard to the finding as to counterclaim there was no evidence of the assessment found. This is in effect admitted by the respondent's counsel, who rely exclusively on the admissions of the defendant's answer, which was verified by Ludlum. But this cannot be regarded as evidence against the plaintiff. It is also clear that neither the allegations of the complaint in intervention or of the findings are sufficient to show a personal indebtedness of Ludlum and Swezey on account of the alleged assessment. All that is alleged or found on this point is, in effect, that at all the times mentioned in the complaint Ludlum and Swezey were each the owner of over eighty thousand shares of the stock of the company, and that on the fifth day of April an assessment of twenty-five cents per share was levied on the stock of the corporation, payable on or before May 8, 1895; that neither paid his assessment, amounting to over twenty thousand dollars, and that at and prior to the assignment to the plaintiff each "was indebted to the corporation defendant in the sum of twenty thousand dollars upon and on account of the assessment so levied as aforesaid, and no part of which has been paid." There is no allegation or finding of any of the facts necessary, under the provisions of the Civil Code, to create a personal liability on the stockholders. (Civ. Code, secs. 331-39, 349; *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490; *Pacific Fruit Co. v. Coon*, 107 Cal. 447.)

The findings, however, would not justify a judgment for the plaintiff. A fraudulent conspiracy is alleged in the complaint in intervention, and, in the absence of findings disposing of these issues, we would not be justified in rendering judgment for the plaintiff.

We therefore advise that the judgment and order denying a new trial be reversed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed.

Harrison, J., Van Dyke, J., Garoutte, J.

Hearing in Bank denied.

[L. A. No. 760. In Bank.—July 20, 1900.]

C. HENNE, Appellant, v. COUNTY OF LOS ANGELES,
Respondent.

ACTION TO RECOVER TAXES PAID UNDER PROTEST—FAILURE TO DEDUCT MORTGAGE FROM ASSESSMENT OF LAND—INSUFFICIENT COMPLAINT—NEGLECT OF PLAINTIFF.—A complaint in an action against a county to recover taxes paid under protest, by reason of nondeduction of a mortgage to the regents of the state university from the total value of the property, which does not state the value of the property, nor show that a statement of plaintiff's property was demanded by or given to the assessor, and which shows that the plaintiff neglected to make any demand upon the assessor for a deduction from the assessment until after the work of the assessor had been performed, and he had lost jurisdiction to correct it, also that he neglected to apply to the supervisors for a reduction of the assessment until after they had lost jurisdiction of the matter, states no cause of action.

APPEAL from a judgment of the Superior Court of Los Angeles County. D. K. Trask, Judge.

The facts are stated in the opinion of the court.

R. L. Horton, for Appellant.

James C. Rives, District Attorney, and Curtis D. Wilbur, Chief Deputy, for Respondent.

VAN DYKE, J.—The court below sustained defendant's demurrer to the complaint, and, the plaintiff declining to amend, judgment was entered thereon in favor of defendant, and the question presented on this appeal is as to the sufficiency of the complaint.

Among other things, it is alleged that the plaintiff is the owner of certain property in the city of Los Angeles known as the Henne block, and that for the fiscal year 1888-89 the assessor of Los Angeles county assessed said property for the sum of ninety-six thousand five hundred and thirty dollars. It is also alleged that on the first day of March, 1898, and for more than a year prior thereto, there was, and still is, a mortgage against said property executed by the plaintiff to

the regents of the University of California for the sum of thirty-five thousand dollars, and that no payment had been made on said mortgage. It is further alleged that no deduction was made or credit given by the said assessor upon said assessment on account of said mortgage for said fiscal year. The plaintiff further avers in his complaint that on the twenty-third day of July, 1898, he made a demand in writing upon the said assessor, that he correct said assessment by deducting from the value of the said property assessed to plaintiff and affected by said mortgage the value of said security; that said assessor neglected and refused to make such correction or deduction; that thereafter, on the third day of November, 1898, the said plaintiff filed his verified petition before the board of supervisors of said defendant county requesting said board to correct, or order to be corrected, upon the assessment-roll of said defendant county, the assessment of the plaintiff, by deducting from the value of said property, as assessed to plaintiff and affected by said mortgage, the value of such security, and that said board of supervisors thereafter denied said petition. It is then averred that plaintiff paid the taxes under protest and presented a verified demand in writing to the board of supervisors of Los Angeles county for the sum claimed to have been overpaid, to wit, four hundred and sixty-six dollars and sixty-six and two-thirds cents, and that said board of supervisors rejected said plaintiff's claim.

There is no averment in the complaint that the assessor failed to make a demand on the plaintiff as a taxpayer for a statement of his property as required by law, nor is there any averment that the plaintiff as a taxpayer made and delivered to the said assessor a statement under oath.

By the constitution, article XIII, section 4, the value of property affected by a mortgage, with certain exceptions, is to be assessed and taxed to the owner of the property, less the value of said security, and the value of such security shall be assessed and taxed to the owner thereof. In this case the mortgage or security, being the property of the state, was exempt from taxation, and could not be assessed. Still, as was held in *People v. Board of Supervisors*, 77 Cal. 136, the value of such security should be deducted from the total value of the property. This value, however, depended upon

what remains still due upon the debt and mortgage, and this fact the record of the mortgage would not disclose. Had the plaintiff furnished the assessor a statement of his property, it would have enabled him then to make a deduction. This not having been done, the plaintiff was furnished an opportunity to have the correction made by applying to the assessor prior to the time when the assessment-roll is required to be passed over to the board of supervisors. The allegation in the complaint is that he applied to the assessor on the twenty-third day of July, 1898, which was some time after the work of the assessor had been delivered to the board of supervisors, as required by law. (Pol. Code, secs. 3652, 3655, 3656, 3672.) The assessor, at the time the application was made, had no jurisdiction in the premises, and could not make any correction if any mistake had been made in his assessment. It is also alleged in the complaint that the plaintiff thereafter, on the 3d of November, filed his verified petition with the board of supervisors to have the correction made. This was also after the board of supervisors had lost jurisdiction of the matter. (Pol. Code, sec. 3682.)

The value of the property, aside from the assessment, is not stated in the complaint, and for aught that appears, the assessment may have been for the value of such property over the amount of the mortgage. But, however that may be, for an overvaluation of the assessment of property belonging to a taxpayer a remedy is furnished him by statute, as already shown, first by an application to the assessor at any time before it passes out of his hand to the board of supervisors, and thereafter to the board of supervisors until the assessments have been equalized and the matter has gone beyond their control. As was said in *Osborn v. Danvers*, 6 Pick. 98: "But great mischiefs would follow if we were to hold that an excess of valuation would render an assessment illegal and void. And it is immaterial whether the excess is caused by including in the valuation property of which the person taxed is not the owner, or that for which he is not liable to be taxed. In both cases the remedy is the same. . . . His only remedy is application for abatement. For when a new right is created by statute, which at the same time provides a remedy for any infringement of it, that remedy

must be pursued." It was the fault of the plaintiff himself in this case that he did not obtain relief by one or the other of the modes indicated, inasmuch as his application was too late in both cases.

Judgment affirmed.

Harrison, J., McFarland, J., Temple, J., concurred.

Rehearing denied.

[S. F. No. 2380. In Bank.—July 20, 1900.]

JOHN E. DALY, Administrator, etc., et al., Respondents, v.
J. T. RUDELL, Appellant.

ACTION TO DETERMINE WATER RIGHTS—JUDGMENT CONFERRING RIGHT TO LAY PIPE—APPEAL—STAY OF PROCEEDINGS—SUPERSEDEAS.—Upon appeal from a judgment in an action to determine water rights, which confers upon the plaintiffs the right to lay a pipe through the land of the defendant, the statutory appeal bond in the sum of three hundred dollars stays proceedings in the court below upon the judgment appealed from; and a *supersedeas* will issue to restrain any proceedings under the judgment to lay the pipe line during the appeal.

APPLICATION for a *supersedeas* pending an appeal from a judgment of the Superior Court of Los Angeles County.
Lucien Shaw, Judge.

The facts are stated in the opinion.

Long & Baker, and George M. Holton, for Appellant.

John E. Daly, for Respondents.

THE COURT.—This case is before us on the application of the appellant for a *supersedeas*. The purpose of the action is to determine certain water rights as between the parties. Plaintiffs had judgment, from which defendant appealed, and gave the statutory appeal bond in the sum of three hundred dollars. By the judgment one of the plaintiffs was

given the right to lay a certain pipe line through premises of appellant; and notwithstanding the appeal, said plaintiff attempted to lay said line, and was obstructed in doing so by defendant, who was cited for contempt for such obstruction. He now asks for a *supersedeas* to restrain any proceedings under the judgment during the appeal.

The judgment does not contain any of the directions mentioned in the Code of Civil Procedure, from section 942 to section 945, inclusive; and therefore the undertaking in the sum of three hundred dollars, prescribed in section 941, "stays proceedings in the court below upon the judgment or order appealed from." (Code Civ. Proc., sec. 949.) It cannot be said that appellant is "not allowing the property to remain as it was at the date of the decree." (*Dewey v. Superior Court*, 81 Cal. 64, 68.)

Let the *supersedeas* issue as prayed for.

[L. A. No. 646. Department One.—July 21, 1900.]

MAIN STREET AND AGRICULTURAL PARK RAIL-
ROAD COMPANY, Respondent, v. LOS ANGELES
TRACTION COMPANY, Appellant.

CONTRACT—SUPPLEMENTAL AGREEMENT—CONSIDERATION.—A supplemental agreement, either adding to or varying the terms of the original contract, so as to impose new and onerous burdens upon one of the parties, requires a consideration to support it; and if there is no consideration in some favorable modification or release of previous obligations, and no new consideration appears, the supplemental agreement cannot be sustained.

ID.—"EXPLANATORY" AGREEMENT—ORIGINAL CONSIDERATION.—The fact that the supplemental agreement is also described as "explanatory" of the first agreement executed at a previous date is not conclusive that it was part of the original agreement, though not included in the writing, so as to be supported by the original consideration.

ID.—PLEADING—WANT OF CONSIDERATION—DEMURRER.—An answer pleading a want of consideration for a supplemental agreement which imposes a new and onerous burden on the defendant, and

does not disclose any consideration therefor on its face, presents a sufficient defense to an action based thereon, and a demurrer thereto is improperly sustained.

ID.—REPUDIATION OF CONTRACT.—It is not in the power of one of the parties to a contract to discharge it by repudiating it. Upon such repudiation, the other party may regard it as discharged, but not the party in fault.

APPEAL from a judgment of the Superior Court of Los Angeles County. Walter Van Dyke, Judge.

The facts are stated in the opinion.

E. H. Lamme, and E. E. Millikin, for Appellant.

A supplemental contract imposing onerous burdens upon one party must be supported by a consideration. (*McCarty v. Hampton Bldg. Assn.*, 61 Iowa, 287; *Ayres v. Chicago etc. R. R. Co.*, 52 Iowa, 478; *Feterman v. Parker*, 10 Ired, 474; *Sweringen v. Hartford Ins. Co.*, 52 S. C. 309; *Geer v. Archer*, 2 Barb. 420; *Smith v. Ware*, 13 Johns. 257; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Reynolds v. Nugent*, 25 Ind. 328; *Coleman v. Applegarth*, 68 Md. 21¹; *Heim v. Butin*, 109 Cal. 500²; *Comstock v. Breed*, 12 Cal. 286; *Brooks v. Johnson*, 122 Cal. 569.) A party to an executory contract may stop performance by an explicit direction, and thereby subject himself only to damages for its breach. (*Danforth v. Walker*, 37 Vt. 244; *Gibbons v. Bente*, 51 Minn. 499; *Collins v. Delaporte*, 115 Mass. 159; *Nebraska City v. Nebraska etc. Coke Co.*, 9 Neb. 339; *Clark v. Marsiglia*, 1 Denio, 317³; *Davis v. Bronson*, 2 N. Dak. 300⁴; *Gabriel v. Akinsville etc. Brick Co.*, 57 Mo. App. 520; *Collyer v. Moulton*, 9 R. I. 90⁵; *Heaver v. Lanahan*, 74 Md. 493.)

Bicknell, Gibson & Trask, for Respondent.

The agreement was supplemental to and explanatory of the original agreement, which was merely modified before performance, and is supported by the original consideration. (*Latti-*

¹ 6 Am. St. Rep. 417.

² 50 Am. St. Rep. 54.

³ 43 Am. Dec. 670.

⁴ 33 Am. St. Rep. 783.

⁵ 98 Am. Dec. 370.

more v. Harsen, 14 Johns. 330; *Munroe v. Perkins*, 9 Pick. 298⁶; *Cummings v. Arnold*, 3 Met. 489⁷; *Holmes v. Doane*, 9 Cush. 138; *Blood v. Enos*, 12 Vt. 625⁸; *Low v. Forbes*, 18 Ill. 569; *Goss v. Nugent*, 5 Barn. & Adol. 65; *Stead v. Dawber*, 10 Ad. & E. 57.) While a written agreement remains executory, its terms may be altered in any way to suit the parties. (Civ. Code, sec. 1698; *Hochstein v. Berghauser*, 123 Cal. 682, 686.)

SMITH, C.—The action was brought to recover money alleged to be due by written contract. The judgment was for the plaintiff. The points relied on for reversal are insufficiency of the complaint and of the findings, and error in sustaining demurrers to two affirmative defenses set up in the answer. In the view we take of the case it will be unnecessary to consider any but the last of these grounds.

At the dates hereinafter mentioned the plaintiff was the owner of a street railroad in the city of Los Angeles along Main street; and the defendant was the owner of a franchise for a railroad along Third street, and was about to enter upon the construction of the same; and on the first day of March, 1895, they entered into a written contract with reference to the crossing of plaintiff's road by that of defendant. Third street, it will be understood, does not cross Main directly, but after entering it from the east follows it northward to a point where it leaves it for the west.

By this contract plaintiff granted to the defendant the right to construct, maintain, and operate, jointly with it, the portion of its railway between the points of most convenient connection of the two railroads at the entrance of Third street into and its departure from Main street, together with the "right to make such connections and crossings" as might be necessary; and the defendant agreed to construct over the portion of Main street described "a good and sufficient railroad track for an electric road in place and stead of the tracks (then) located on Main street, and also to erect all necessary electric apparatus along said Main street between the points named"; and to make the necessary connections.

⁶ 20 Am. Dec. 475.

⁷ 37 Am. Dec. 155.

⁸ 36 Am. Dec. 363.

Afterward—July 13, 1895—another contract was executed by the parties—entitled an “agreement supplemental and explanatory” of the former; wherein the defendant agreed, “in the event of (the plaintiff) electing to spread its tracks to a greater distance than . . . eight and one-half feet from center to center of tracks, to pay all costs and expenses incident to the making of the necessary change in the said crossing to conform to the change made in the distance between the said tracks.”

The execution of these contracts is alleged in the complaint, and copies are attached. The complaint then proceeds to allege that after the execution of the latter contract plaintiff determined to reconstruct its railroad along Main street, including the part of the street described in the agreement, and in doing so widened or spread its tracks from eight and one-half feet from center to center of tracks to eleven feet; and that the cost and expenses incident to making the necessary changes in said crossing, and which were thereon necessarily expended, was the sum of twelve hundred and sixty dollars and two cents; and prays judgment for that sum.

The affirmative defenses set up in the answer—to which demurrers were sustained—are: 1. That there was no consideration for the supplemental agreement; and 2. That, before the work referred to in the complaint was commenced, defendant repudiated the supplemental contract and notified plaintiff to that effect.

1. In the former defense the facts alleged are, in effect, that the defendant, being the owner of a franchise from the city for the construction and operation of its road, made with the plaintiff the contract of March 1, 1895, and, in accordance therewith, was on or about July 13, 1895, proceeding to construct its railway along the portion of Main street described in the contract, when plaintiff demanded of it the execution of the supplemental agreement of that date, which the defendant accordingly executed; that there was no consideration for said agreement; and that before the commencement of the work alleged in the complaint—which was done in the year 1897—plaintiff was notified that defendant objected to the proposed change, and would not pay therefor. It is claimed by defendant that the demurrer to this defense

was improperly sustained; which is the point to be considered.

There can be no doubt of the principle contended for by the appellant that an agreement adding to the terms of an existing agreement between the same parties, and by which new and onerous terms are imposed upon one of the parties without any compensating advantage, requires a consideration to support it; though this, of course, may consist either in a new consideration or in some favorable modification of the original contract. (*McCarty v. Hampton Bldg. Assn.*, 61 Iowa, 287; *Ayres v. Chicago etc. R. R. Co.*, 52 Iowa, 478; *Feterman v. Parker*, 10 Ired. 474; *Swearingen v. Hartford Ins. Co.*, 52 S. C. 309; *Smith v. Ware*, 13 Johns. 257; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Reynolds v. Nugent*, 25 Ind. 328.) An executory contract may, indeed, be altered or modified by the parties. (Civ. Code, sec. 1698.) "But. . . the variation of a contract is as much a matter of contract as the original agreement" (*Feterman v. Parker*, *supra*); and a contract for such variation, equally with other contracts, requires a consideration. (Anson on Contracts, 88 (68).) There is an exception to this rule provided in the Code of Civil Procedure, section 1697, for the case of parol contracts; but this has no application to written contracts.

In this case, properly speaking, the supplemental agreement is not a modification or alteration of the original contract—which remains unaltered and unimpaired, but rather an addition to it of a new and onerous obligation, for which there is no compensation either in the release of previous obligations or in a new consideration. It would seem, therefore, directly within the principle announced.

It is claimed, however, by the respondent's counsel that the supplemental agreement is declared by its terms to be merely "explanatory" of the first; from which it is inferred that it was in fact a part of the original agreement, though not included in the writing; and, undoubtedly, could this be conclusively inferred from the language used, the original consideration would be sufficient to support it. But the use of the word "explanatory" cannot be regarded as conclusive on this point; nor was the defendant precluded by this re-

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cital from showing that the agreement was not part of the original contract. and consequently that there was in fact no consideration. (Civ. Code, secs. 1614, 1615; 1 Greenleaf on Evidence, 16th ed., secs. 284, 304.) Whether there was or was not a consideration for the new agreement was the precise issue raised by the plea, and the demurrer should therefore have been overruled.

2. With regard to the second affirmative defense the demurrer was rightly sustained. It is not in the power of one of the parties to a contract to discharge it by repudiating it. Upon such repudiation, the other party may regard it as discharged; but not the party in fault. (Anson on Contracts, 363 (276) et seq.) The cases cited, though some of them unguardedly expressed, relate only to the measure of damages. (*Heaver v. Lanahan*, 74 Md. 493, and cases cited.)

We advise, therefore, that the judgment be reversed and cause remanded for further proceedings in accordance with this opinion.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and cause remanded for further proceedings in accordance with this opinion.

Harrison, J., Garoutte, J., McFarland, J.

[Crim. No. 644. In Bank.—July 21, 1900.]

THE PEOPLE, Respondent, v. J. W. ARNETT, Appellant.

CRIMINAL LAW—ASSAULT WITH INTENT TO MURDER—VOID VERDICT—
DISCHARGE OF JURY WITHOUT CONSENT—JEOPARDY—ACQUITTAL.—

Under an information charging a defendant with an assault with intent to commit murder, a void verdict for an assault with a deadly weapon, an offense not included in the charge, constitutes no legal reason for a discharge of the jury without the consent of the defendant; and in case of such discharge appearing to have been made without his consent, entered upon the minutes of the court, the defendant upon a second trial is entitled to an acquittal upon a plea of once in jeopardy and a former acquittal.

APPEAL from a judgment of the Superior Court of Lassen County. F. A. Kelley, Judge.

The facts are stated in the opinion of the court.

E. V. Spencer, and H. D. Burroughs, for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

GAROUTTE, J.—The defendant was tried upon an information charging assault with intent to commit murder. He was convicted of the crime of assault with a deadly weapon. Upon appeal to this court it was held that the verdict was a nullity, as the offense of which the defendant was convicted was not an offense included within the information upon which he was tried. (*People v. Arnett*, 126 Cal. 680.) Upon the second trial the defendant was convicted of the offense charged in the information; but the court instructed the jury to find against him upon his plea of once in jeopardy and a former acquittal. He now claims this was error upon the part of the court, and that the proceedings of the first trial resulted in placing him in jeopardy, which should have demanded his discharge at the second trial.

It was held upon the previous appeal that the verdict rendered at the first trial was a nullity. Indeed, by that decision, the case after verdict stood exactly the same as though the verdict had been one declaring the defendant guilty of the crime of robbery. The case in principle is similar to that of *People v. Curtis*, 76 Cal. 57. The defendant has been in jeopardy by reason of the first trial and the void verdict rendered therein, and is now entitled to his discharge, unless at the first trial he consented to the discharge of the jury without a verdict, and thus waived the jeopardy which had attached to him. It is said in the *Curtis* case: "The verdict constituted no legal reason for the discharge of the jury, and, in our judgment, if they were discharged without consent of the defendant (except in the cases specially provided for) it operated as an acquittal of the defendant. . . . Under our statute, in a case like this, the consent must appear on the minutes of the court."

In this case the jury was not discharged upon any of the statutory grounds, and we find no consent in the minutes upon the part of the defendant that the jury might be discharged. In the Curtis case the minutes of the trial court were not before this court, but in this case the minutes are before the court, and, under these circumstances, nothing is to be presumed, for the minutes speak for themselves. This is the vital difference between the two cases.

The defendant not having consented to the discharge of the jury at the previous trial, and the verdict rendered being a nullity, jeopardy attached to him, and he was entitled to plead it upon his second trial. Upon the facts and the law the plea was a good one, and should have been sustained.

The judgment is reversed and the cause is remanded with directions to the trial court to discharge the defendant.

Van Dyke, J., Harrison, J., McFarland, J., and Temple, J., concurred.

[S. F. Nos. 1224, 1256. Department One.—July 23, 1900.]

HENRY MELDE, Respondent, v. JOHN REYNOLDS, Appellant.

SETTING ASIDE JUDGMENT—FAILURE TO ATTEND TRIAL—MISTAKE AND EXCUSABLE NEGLECT—ABUSE OF DISCRETION—REVERSAL UPON APPEAL.—Where it is made to appear that the failure of the defendant to be represented at the trial was owing to the mistake and excusable neglect of his attorneys, who were misled as the result of reasonable inquiries, the exercise of the discretion of the court requires it to set aside the judgment for the plaintiff; and its action in refusing to do so is an abuse of discretion, and will be reversed upon appeal.

Id.—CONSTRUCTION OF CODE—REMEDIAL PROVISION.—Section 473 of the Code of Civil Procedure, which provides that "the court may, in its discretion, after notice to the adverse party, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceedings taken against him through his mistake, inadvertence, surprise, or excusable neglect," is remedial, and is to be liberally construed, under section 4 of the same

code, with a view to effect its objects and promote justice. It is best observed by disposing of causes on their substantial merits, rather than with strict regard to technical rules of procedure.

ID.—EXERCISE OF DISCRETION OF COURT.—The discretion of the court, under section 473 of the Code of Civil Procedure, ought always to be exercised in conformity with the spirit of the law, and so as to subserve, rather than impede or defeat, the ends of justice, regarding mere technicalities as obstacles to be avoided, rather than as principles to be made effective in derogation of substantial right.

ID.—RIGHTS OF PLAINTIFF—COMPENSATION FOR DAMAGE.—The plaintiff, though not in any respect chargeable with the failure of the defendant to be represented at the trial, and though his attorneys made all reasonable effort to secure the representation of the defendant before proceeding with the trial, cannot claim the right to enforce the judgment rendered in his favor through the mistake and excusable neglect of the defendant; but he has the right to be compensated for the damage actually sustained by him at the hands of the defendant.

ID.—AFFIDAVIT OF MERITS BY ATTORNEY—VERIFIED ANSWER—WAIVER OF OBJECTION.—The fact that an affidavit of merits was made by defendant's attorney in the excusable absence of the defendant from the state is not ground for sustaining an order refusing to vacate the judgment, where it appears that the verified answer of the defendant contradicting all the averments of the complaint was on file before the trial, and where it does not appear that any objection upon that ground was made in the court below, and the motion was not denied upon that ground.

ID.—PERSONAL AFFIDAVIT OF MERITS NOT JURISDICTIONAL.—An affidavit of merits by the defendant himself in person is not a jurisdictional requisite for granting relief under section 473 of the Code of Civil Procedure, and may be dispensed with, if the court is otherwise satisfied that the application is meritorious, and is made in good faith, and not for delay. The verified answer of the defendant on file may be considered by the court in determining the question of merits and good faith, as well as the affidavit of his attorney.

ID.—FURTHER AFFIDAVIT—OBJECTION OF PLAINTIFF—CONTINUANCE OF HEARING.—If the court deems a further affidavit necessary, or the plaintiff should object to the application for want of a personal affidavit of merits by the defendant, it should continue the hearing a sufficient time to enable it to be procured.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from orders refusing to vacate the judgment and denying a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

Smith & Murasky, and William J. Herrin, for Appellant.
Dorn & Dorn, and Carson & Savage, for Respondent.

HARRISON, J.—Judgment herein was rendered in favor of the plaintiff and against the defendant April 23, 1897, and was entered of record April 26th. May 25th the defendant gave notice of a motion to vacate and set aside the judgment, upon the ground that it was rendered through mistake, inadvertence, and excusable neglect on his part, accompanying the same with certain affidavits in its support. At the hearing of the motion counter-affidavits and other documentary evidence were presented on behalf of the plaintiff, and the motion was denied. From this order the defendant has appealed.

It appears from the bill of exceptions that the complaint was filed in May, 1889, and that in July of that year the defendant filed an answer denying all the allegations of the complaint. No action was taken by either party tending to bring the case on for trial, and in 1890 it was dropped from the calendar by stipulation. In November, 1896, the attorney for the defendant gave notice of a motion to dismiss the action. This was met with a counter-motion on behalf of the plaintiff to set the cause for trial. Both motions were heard at the same time, and the court denied the motion to dismiss and set the action down for trial for April 23, 1897—that day being agreed upon by the attorneys for both parties. A few days prior to that date Mr. Shadbourne, the attorney for the defendant, informed him of these facts, and on the following day the defendant visited him at his office and upon expressing dissatisfaction at his course Mr. Shadbourne suggested that he get another attorney, which he said he would do, and Mr. Shadbourne thereupon gave him the papers in the cause. The defendant thereupon employed Messrs. Smith and Murasky as his attorneys, and on the next day Mr. Murasky instructed his managing clerk to ascertain what proceedings had been taken in the case, and was informed by him, after such examination had been made, that the action was pending in Department No. 4 of the superior court, and that a motion to set the cause for trial had been granted, but that the date for said trial was not contained in the records of the case. Mr. Murasky

then inquired of the clerk, and also of the judge of that department, upon what day the trial of the cause had been set, and was informed by each of these officers that, as the cause did not appear upon the calendar for any date, it would not be reached for trial for at least three months. He thereupon informed the defendant that there was no likelihood of a trial being had for several months, and on the 21st of April the defendant left San Francisco for Japan. When the action was originally brought it was assigned to Department No. 4, and has subsequently been transferred to Department No. 5, but Mr. Murasky had no knowledge of such transfer until after the judgment had been rendered. On the 23d of April no appearance was made in behalf of the defendant, and the cause was tried and judgment rendered in favor of the plaintiff.

When these facts were made to appear to the court a proper exercise of its discretion required it to set aside the judgment. (See *Dougherty v. Nevada Bank*, 68 Cal. 275; *Grady v. Donahoo*, 108 Cal. 211.) Section 473 of the Code of Civil Procedure provides: "The court may, in its discretion, after notice to the adverse party, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect." This is a remedial provision, and under the terms of section 4 of the same code, which require it to be liberally construed with a view to effect its objects and promote justice, is best observed by disposing of causes upon their substantial merits, rather than with strict regard to technical rules of procedure. The discretion of the court ought always to be exercised in conformity with the spirit of the law, and in such a manner as will subserve rather than impede or defeat the ends of justice, regarding mere technicalities as obstacles to be avoided rather than as principles to which effect is to be given in derogation of substantial right. (*Roland v. Kreyenhagen*, 18 Cal. 455; *Bailey v. Taaffe*, 29 Cal. 424; *Watson v. San Francisco etc. R. R. Co.*, 41 Cal. 17.)

That the failure of the defendant to be represented at the trial and the rendition of judgment against him in his absence was the result of a mistake must be conceded, and it

may be conceded that this mistake was owing to neglect; but if the neglect was under the circumstances excusable, he was entitled under the provisions of this section to be relieved therefrom. His absence was not owing to any neglect on his part, inasmuch as he had been advised by Mr. Murasky that the cause could not be tried for several months. It is true that the day upon which it was called for trial had been agreed to by his attorney, Mr. Shadbourne, and although he was technically bound by the acts of his attorney, and chargeable with knowledge of the fact that that day had been fixed for the trial, it is not claimed that Mr. Murasky knew of what Mr. Shadbourne had agreed to, and if this ignorance was excusable, the provisions of the above section are applicable. The purpose of this section is to enable courts to relieve a party from the consequences of enforcing the strict and technical rules of procedure, by applying such equitable rules in any individual case as will do justice between the litigants. Neither is it sufficient to say that by a diligent examination Mr. Murasky could have learned that the cause had been set for trial on the 23d of April. What the court was called upon to ascertain when this application for relief was made was whether his failure to learn that fact was under the circumstances excusable, or was the result of carelessness or inattention. When it appeared that he had in good faith made an earnest effort to ascertain the condition of the cause, and had availed himself of such means as would be ordinarily employed, but was misled thereby, he could justly claim that his mistake was not the result of negligence. To hold that notwithstanding all his efforts a party is bound by the result of any mistake which is made in the prosecution or defense of his cause, would deprive him of the very remedy which section 473 is intended to provide. Mr. Murasky had intrusted the examination of the records to his managing clerk, whose capacity is not impugned, and the court could not fail to recognize the fact that the details of a law office in extensive practice are greatly under the supervision of a managing clerk, and that the attorney is dependent upon him for information as to the condition of the causes in his office. When Mr. Murasky was informed by his clerk that the cause was pending in Department No. 4, and that a motion to set the

cause for trial had been granted, but that the records did not show the date for which the trial was set, he sought to ascertain this date from the clerk of that department, and also from the judge thereof, and when informed by both of these officers that the cause would not be reached for trial for at least three months, he could not be charged with neglect in accepting their statements as correct and acting accordingly. The fact that the columns of the "Daily Law Journal" showed that the cause was set for trial in Department No. 5 for April 23d is not sufficient to establish neglect on his part. The copy of the complaint which the defendant handed him indicated that when the action was commenced it was assigned to Department No. 4, and his clerk had informed him that it was still pending in that department. Under these circumstances his failure to observe this publication in the "Journal" is not attributable to any neglect. We are of the opinion that the facts presented in behalf of the defendant established an ample excuse for his failure to be represented at the trial, and that the court should have granted his application.

It is not claimed that the plaintiff was chargeable in any respect with the defendant's failure to be represented at the trial. On the contrary, it appears that the plaintiff's attorneys made all reasonable effort to secure his presence before proceeding therein. The plaintiff, however, cannot claim the right to enforce a judgment which was rendered in his favor, by reason of a neglect on the part of the defendant which in the eye of the law is excusable. He has the right to be compensated for the damage which he has sustained at the hands of the defendant; but if the defendant has, without any fault on his part, been prevented from presenting his defense, it is but simple justice that he should have an opportunity therefor. If it had been made to appear that the plaintiff would thereby be subjected to additional expense, or that any loss or damage would result from granting the defendant's motion, the court could indemnify him by making the order "upon such terms as may be just." No showing was made on his behalf, however, that he would be injured by setting the judgment aside in any respect other than by the delay and inconvenience of a second trial, and for all this he could be compensated by the terms which

the court would impose as the condition of making the order. The trial of the cause had been delayed for nearly eight years since it had been at issue, and it cannot be assumed that the plaintiff would be greatly prejudiced by a few weeks' additional delay.

It is urged by the respondent that the order should be affirmed upon the ground that a proper affidavit of merits was not presented to the court—the affidavit presented being made by Mr. Murasky, and not by defendant. It does not appear that this objection was made in the court below, nor did the court deny the application upon this ground, and we are of the opinion that, under the circumstances shown, the court would not have been authorized to do so. Upon the advice of his attorney that the cause would not be tried for several months, given under circumstances sufficient to exonerate him from all charge of neglect, the defendant had left the state on the 21st of April for Japan, and at the time the application was made was absent from the state, and thus prevented from presenting an affidavit made by himself. An affidavit of merits made by the defendant in person is not a jurisdictional element for granting relief under this section, and in a case like the present may be dispensed with if the court is otherwise satisfied that the application is meritorious and is made in good faith, and not merely for delay. The verified answer of the defendant contradicting all the averments of the complaint was on file, and could be considered by the court for the purpose of determining this fact. (See *Fulweiler v. Hog's Back etc. Min. Co.*, 83 Cal. 126; *Merchants' Ad-Sign Co. v. Los Angeles Bill Posting Co.*, 128 Cal. 619.) The court had before it also the affidavit of Mr. Murasky, and in addition thereto could take into consideration the evidence that had been presented on behalf of the plaintiff at the time the judgment was rendered. Under these circumstances it was authorized to hold that a further affidavit from the defendant was not necessary. If it had deemed a further affidavit requisite, or if the plaintiff had made objection to the application on this ground, it should have continued the hearing a sufficient time to enable it to be procured.

2. After the court had denied the defendant's motion to set aside the judgment, he moved for a new trial upon the ground of accident and surprise which ordinary prudence

could not have guarded against, and filed certain affidavits in support of his motion. Counter-affidavits were filed on behalf of the plaintiff, and the court denied the motion. From this order, and also from the judgment, the defendant has also appealed, and the record of this appeal is presented in case S. F. No. 1256.

Inasmuch as we hold that the court should have granted the defendant's motion to set aside the judgment, the order to be made in pursuance of our judgment reversing its action will render the motion for a new trial and the action of the court thereon of no moment, and the necessity of considering the appeal therefrom is therefore obviated.

The order appealed from in S. F. No. 1224 is reversed, and the superior court is directed to enter an order as of June 25, 1897, setting aside and vacating the judgment theretofore entered, and restoring the cause to its calendar for trial. Case No. 1256 is also remanded for further proceedings.

Van Dyke, J., and Garoutte, J., concurred

Hearing in Bank denied.

[S. F. No. 1968. Department One.—July 23, 1900.]

H. J. HIPPEN, Respondent, v. A. B. FORD et al., Appellants.

MANDAMUS—LIQUOR LICENSE—COMPLIANCE WITH ORDINANCE—INSUFFICIENT SHOWING—TENDER—DEMAND.—A *mandamus* cannot be sustained to compel the issuance of a liquor license by municipal authorities, where there is no sufficient evidence of the petitioner's compliance with the requirements of the municipal ordinance providing for the issuance of such licenses, or tending to prove a tender by him of the money required for the license, and where there is neither averment, proof, nor finding of a demand by him for the license, or of facts showing that such demand would have been of no avail.

ID.—BURDEN OF PROOF—FINDINGS AGAINST EVIDENCE—APPEAL—REVERSAL OF JUDGMENT.—The burden of proving that the petitioner complied with the law, and took all the necessary steps required

to make it the duty of the municipal board to issue the license, is upon the petitioner; and if findings of such compliance are not sustained by the evidence, a judgment in his favor granting a writ of mandate must be reversed upon appeal.

APPEAL from a judgment of the Superior Court of San Mateo County. George H. Buck, Judge.

The facts are stated in the opinion of the court.

Charles N. Kirkbride, and George C. Ross, for Appellants.

Charles G. Nagle, for Respondent.

COOPER, C.—This proceeding was brought for the purpose of obtaining a writ of mandate to compel the defendants, in their official capacity as the board of trustees of the city of San Mateo, to issue a license to petitioner for the sale of liquors at retail within said municipal corporation. After trial judgment was entered in favor of petitioner that the writ issue as prayed for. This appeal is from the judgment upon the judgment-roll and a bill of exceptions. It appears from the record that the court below excluded all evidence except evidence of what was done by petitioner in presenting his application to the defendants, and as to the action of the defendants in their official capacity in relation thereto. It must therefore appear that the petitioner complied with the law, and took all the necessary steps required in order to show that it was the duty of defendants to issue the license. The burden of proving all the facts in issue necessary to make it the duty of defendants, as a board, to issue the license was upon petitioner. The petitioner alleges that in making the application he duly complied with all the laws, rules, ordinances, and regulations of said municipality, and performed all and every requirement necessary under and by virtue of said laws, ordinances, rules, and regulations. The court found in the language of the pleading that the petitioner in making his application duly complied with all the laws, ordinances, rules, and regulations of said city, and performed all the acts required of him to be performed under such laws, rules, and ordinances. Conceding that this finding is sufficient, and that it is a finding of facts and not of conclusions of law, it is not supported by the evidence.

The ordinance of the city introduced by petitioner, and upon which he relies, requires that each applicant for a license shall cause to be published in a newspaper published in the city of San Mateo, for not less than three successive issues of said newspaper immediately preceding any regular meeting of said board at which the application will be made, a notice that the applicant will apply at such regular meeting for a permit to obtain a license. The ordinance further prescribes the form of the notice, and that proof of the due publication thereof must be made by the affidavit of the publisher. There is nothing in the record to show that such notice or any notice was published in any paper, or that any proof was made by affidavit or otherwise of any publication in any manner of such notice. The ordinance further provides, as a condition upon which the license shall be issued, that the applicant shall accompany his application with a good and sufficient bond in the penal sum of one thousand dollars, containing certain prescribed conditions, with two sureties, each of whom shall be a resident and freeholder of said city of San Mateo, and neither of whom shall be an applicant for nor a holder of any permit or license under the ordinance; and that such bond shall be subject to the approval or rejection of the chairman of the board of trustees, and shall not be approved unless such chairman shall deem each of the sureties thereon sufficient for the whole penal sum of said bond. The bond introduced in evidence does not appear to have been approved by the chairman of the board or by anyone else. Neither is there any evidence in the record tending to show that the sureties in the bond possessed the qualifications required by the ordinance, or that any request was made of the chairman to approve the bond. It is alleged in the complaint and found by the court that petitioner tendered to defendants the sum of thirty dollars, the amount due for a license, under the ordinance. There is no evidence in any manner tending to prove such tender. There is no allegation in the petition, nor finding by the court, that the petitioner demanded of defendants that a license be issued to him. It was necessary to prove that a demand was made of defendants to issue the license, or, in case no demand was made, it was necessary to allege and

prove facts showing that such demand would have been of no avail.

The judgment should be reversed and the cause remanded, with directions to the court below to allow petitioner to amend his petition if so advised.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to the court below to allow petitioner to amend his petition.

Garoutte, J., Van Dyke, J., Harrison, J.

[L. A. No. 605. Department Two.—July 24, 1900.]

ELIZABETH MURRAY, Respondent, v. LAURENT ETCHEPARE et al., Defendants. MARIA E. C. DE LEONIS, Appellant.

FORECLOSURE OF MORTGAGE—HOSTILE TITLE NOT TO BE LITIGATED.—In an action to foreclose a mortgage, a title asserted which is paramount and hostile to that both of the mortgagor and mortgagee cannot be litigated, but must be asserted in a different action.

ID.—CROSS-COMPLAINT—CONVEYANCE PROCURED BY FRAUD OF MORTGAGOR—KNOWLEDGE OF MORTGAGEE—INJUNCTION.—A cross-complaint of a defendant in such action, who was a former owner of the mortgaged premises, averring that the conveyance made to the mortgagor was procured by fraud and false representations on his part, and that these facts were known to the plaintiff when the mortgage was taken, and praying for an injunction to restrain the foreclosure of the mortgage, asserts a paramount and hostile title, and should not be permitted to be filed.

ID.—INSUFFICIENT ANSWER—JUDGMENT UPON PLEADINGS.—Where the facts averred in the cross-complaint are also set forth in the answer of the same defendant, they constitute no defense to the action of foreclosure, and judgment is properly rendered for the plaintiff upon the pleadings foreclosing the mortgage for the amount found to be due.

ID.—FORM AND EFFECT OF DECREE OF FORECLOSURE—ADVERSE TITLE NOT AFFECTED.—A decree of foreclosure is in better form when it expressly saves all paramount and hostile rights asserted by a defendant; but the absence of such form is not material, as the

decree, no matter what its terms may be, has no effect whatever upon a paramount and adverse title or estate.

Id.—ADVERSE EQUITABLE ESTATES.—The principle that adverse titles cannot be litigated in a foreclosure suit, and are not affected by the decree of foreclosure, applies as well to adverse equitable estates as to adverse legal estates.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lucien Shaw, Judge.

The facts are stated in the opinion of the court.

Dunnigan & Dunnigan, for Appellant.

Horace Bell, and George H. Smith, for Respondent.

McFARLAND, J.—Action to foreclose a mortgage executed February 12, 1895, by defendant Etchepare to plaintiff. Leonis was made a party defendant upon the averment that she claimed some interest in the mortgaged premises "subsequent to and subject to the lien of the plaintiff's mortgage." Etchepare suffered default. Leonis answered, averring that she was the owner of the premises on and prior to July 31, 1894, and on that day conveyed the same to defendant Etchepare; that the conveyance to the latter was procured by fraud, false representations, etc., and that these facts were known to plaintiff when she took the mortgage. She also presented a cross-complaint, in which she set up these facts and prayed that plaintiff be restrained from foreclosing the mortgage, etc.; but the court refused to allow the same to be filed. Judgment was then rendered on the pleadings, foreclosing the mortgage for the amount found to be due. Leonis appeals from the judgment. These rulings of the court below were correct, and we see no reason for reversing the judgment. The title asserted by appellant to the mortgaged premises was paramount and hostile to that of both the mortgagor and mortgagee, and it has been definitely established here that such a title cannot be litigated in an action to foreclose a mortgage. (*San Francisco v. Lawton*, 18 Cal. 474¹; *Croghan v. Minor*, 53 Cal. 15; *Marlow v. Barlow*, 53 Cal. 456; *Ord v. Bartlett*, 83 Cal. 428; *Cody v. Bean*, 93 Cal. 578; *Sichler v. Look*, 93 Cal. 608, 609.) The rule is not

affected by the cases of *Houghton v. Allen*, 75 Cal. 102, *Hewlett v. Pilcher*, 85 Cal. 542, and *Randall v. Duff*, 79 Cal. 115. In the *Houghton* case it appears from the briefs that the parties did not raise the question here involved—evidently because they wanted other important matters touching their property rights definitely determined in that action; and the court did not see fit itself to raise a question which the parties had ignored. But the court, in its opinion, restated the rule by saying “the rights only of those who hold or claim under the mortgagor can be determined in an action to foreclose a mortgage; a title claimed adversely to the mortgagor cannot be thus litigated”—citing authorities above referred to. In the *Hewlett* case the question decided was one of evidence, and there is no reference in the case to the point here involved. Moreover, the fact that the defendant there had succeeded to the title of the mortgagor by a judgment rendered subsequently to the mortgage was probably the reason why the point involved in the case at bar was not made in that case. *Randall v. Duff*, *supra*, was a different case from the one at bar. That action was brought by a purchaser under a foreclosure sale to quiet title against the owner of the mortgaged premises, whose attorney in fact had, without authority, conveyed the land in the owner’s name to the mortgagor. It was not an action to foreclose a mortgage; and the question involved was the right of the defendant to redeem. Before the action to foreclose—under which plaintiff claimed—had been commenced, the defendant had commenced an action to set aside the deed of his attorney, of which action plaintiff had notice; and it was this fact, together with other circumstances, that, as the court said, “entitled William Duff [the defendant] to be made a party to the foreclosure suit, and that his right to redeem could not otherwise be barred.” The theory was that William Duff was, under the facts, substantially in the position of a subsequent grantee, or that he was himself really the mortgagor; otherwise he need not have relied on his “right to redeem”—which was the question in the case. If he had been in the position of one holding the paramount title adversely to both mortgagee and mortgagor, that title would have been unaffected by the foreclosure.

The judgment in the case at bar would have been in better form if it had expressly saved all the rights of appellant which are paramount and adverse to those of the mortgagor and mortgagee, as was ordered in *Ord v. Bartlett*, *supra*, and *Cody v. Bean*, *supra*; but as it has been so clearly declared by this court that a decree of foreclosure, no matter what its terms may be, has no effect on a paramount title, we do not deem it necessary to order the judgment modified in that respect in the case at bar. In *Sichler v. Look*, *supra*, the court, speaking of a defendant who was alleged in the foreclosure suit to claim some interest in the mortgaged premises, says: "A sale of the mortgaged premises under the judgment entered against him by default will be limited in its effect to the rights acquired therein by him subsequent to the mortgage, irrespective of the character of the averment"—citing cases. It is proper to make such a person defendant in a foreclosure suit, and "the character of his interest is immaterial to the plaintiff, and need not be set forth in the complaint." (*Sichler v. Look*, *supra*, and cases there cited.) Such a defendant, if he have an interest subject to the mortgage, can appear, if he so desires, and have such interest protected or enforced by the judgment. If his title be a paramount one it will not be affected by a foreclosure whether he appear or not; but if he undertakes to set up such paramount title it will not be litigated in the action. In such case the plaintiff could successfully demur to the answer, which was done in *Ord v. Bartlett*, *supra*, or could dismiss the action as to the adverse claimant; but in no event would the decree of foreclosure affect the paramount and adverse title. There is no reason why the principle does not apply to an equitable paramount title as well as to a legal one. In *Croghan v. Minor*, *supra*, the court said: "It is manifest that those claiming either legal or equitable estates adversely to that of the mortgagor are not proper parties to such a proceeding."

There is no ground for making this case an exception to the rule. If the law permitted it, any other kind of an adverse and paramount claim could be litigated in a foreclosure suit, as well as the one sought to be litigated in the case at bar; and if the law be violated in one case, exceptions would

soon so darken the definitely established rule as to throw the whole matter into doubt and confusion. "Such titles must be settled in a different action." (*Ord v. Bartlett, supra.*) It appears, incidentally, that appellant has already commenced such an action; and in that action her rights can be fully protected and enforced.

The judgment is affirmed.

Temple, J., and Henshaw, J., concurred.

[S. F. No. 1201. Department Two.—July 24, 1900.]

FRITZ KRUG et al., Respondents, v. F. A. LUX BREW-
ING COMPANY, Appellants.

FINDINGS—SUPPORT OF JUDGMENT—INDECISIVE REFERENCE TO PLEADINGS.—Where the answer contains both denials and affirmative allegations of matter of defense, findings that all of the allegations of the complaint are true, and that all of the allegations of the answer, so far as they are inconsistent with the allegations of the complaint, are not true, cannot support a judgment for the plaintiff. Such findings leave it undecided what allegations of the answer are inconsistent with the allegations of the complaint.

ID.—DUTY OF LOWER COURT—FINDINGS NOT MADE UPON APPEAL.—It is the duty of the lower court to make its findings certain and decisive; and this court will not assume the function of determining for the first time upon appeal what allegations are true or false, either by reference to the testimony or by reference to other facts found.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Otto Tum Suden, for Appellant.

Hotaling & Spencer, for Respondents.

McFARLAND, J.—This action is based on a promissory note alleged to have been made by the corporation defend-

ant to the plaintiffs. The answer contains specific denials of certain averments of the complaint and also certain affirmative allegations which, if true, constitute a defense to the action. Judgment went for the plaintiffs, and the defendant appeals from the judgment.

The defendant contends that the findings do not support the judgment, and this contention must be sustained. The only findings made by the court are as follows: "That all the allegations of plaintiffs' complaint in said action are true. That all the allegations of defendant's answer in said action, so far as they are inconsistent with the allegations of said complaint, are not true." It has been established by a long line of decisions in this state that such a finding is insufficient to support a judgment. (*Ladd v. Tully*, 51 Cal. 277; *Johnson v. Squires*, 53 Cal. 37; *Harlan v. Ely*, 55 Cal. 340, 344; *Bank of Woodland v. Treadwell*, 55 Cal. 379; *Goodnow v. Griswold*, 68 Cal. 599.) Of course, as was held in *Williams v. Hall*, 79 Cal. 606, and in many other cases, a finding that "all the allegations of the complaint are true and all the averments of the answer are untrue," is sufficient; but the findings in the case at bar that the allegations of defendant's answer, "so far as they are inconsistent with the allegations of said complaint, are not true," leave entirely undecided what allegations of the answer are inconsistent with the allegations of the complaint. The case at bar cannot be distinguished from *Harlan v. Ely*, *supra*, where the court, having made some special findings, then found generally that all the allegations of the answer are untrue, "except only in so far as the same accord with the foregoing facts." This court in reversing that case said: "The court below should have assumed the labor of comparing the allegations of the answer with the facts by it found; as it is, we are not informed which allegations of the answer were, in the opinion of the court below, true, which untrue. We cannot assume the function of determining for the first time the truth or falsity of any of them, either by reference to the testimony or to the facts actually found. A finding that all the 'material' averments of a pleading are true or untrue is insufficient. (*Ladd v. Durkin*, 54 Cal. 395. See *Johnson v. Squires*, *supra*.) But the fifth finding is no more certain

than a finding which refers only to material allegations." In *Bank of Woodland v. Treadwell, supra*, this court said: "The court found 'that all the allegations of the complaint are true, and all the allegations and denials of the answer contradicting the complaint in any respect are untrue.' This is not a finding upon the issue tendered by the answer as above given; the judgment must therefore be reversed for want of sufficient finding." In *Ladd v. Tully, supra*, the finding was that all the "material" facts stated in the complaint are true; and this court said: "But we have no means of determining what facts the court deemed 'material,' and have no information from the findings upon this point. So loose a method of finding the facts cannot be tolerated, and would lead to most serious perplexities." In *Goodnow v. Griswold, supra*, the finding was that "the several allegations of said complaint not in conflict with the foregoing findings are true"; and this court said: "We are not informed which of the other findings were, in the opinion of the court below, in conflict with the findings referred to as the 'foregoing facts'"; and the court said, quoting the language of *Harlan v. Ely, supra*: "We cannot assume the function of determining for the first time the truth or falsity of any of them, 'either by reference to the testimony' or to the facts actually found." The case at bar is clearly within the foregoing decisions; and we cannot disregard the established law in order to meet the exigencies of a particular case. We have heretofore called attention to the fact that the announcement of a trial court of its intention to decide a case a particular way does not end the case, but that care must be taken, under our system, in preparing findings which will support the judgment that is to be rendered.

The judgment is reversed.

Temple, J., and Henshaw, J., concurred.

[Sac. No. 675. Department Two.—July 24, 1900.]

O. B. POWERS, Appellant, v. A. F. HITCHCOCK, Respondent.

ACTION INVOLVING TITLE TO OFFICE—JUSTICE OF THE PEACE—PARTY NOMINATION—LEGALITY OF ELECTION—INSUFFICIENT COMPLAINT.—

A complaint setting forth that at a former election plaintiff was elected justice of the peace of a specified township, and had qualified and acted as such continuously until the commencement of the action, and that at the last election defendant's name was placed upon the ballot as having been nominated by a Republican convention, when he had not been so nominated, and that his election was illegal, but that he had received the certificate of election, and would exercise the functions of the office unless restrained, and praying for an injunction to restrain from so doing. does not state a cause of action.

ID.—QUO WARRANTO—INTRUSION INTO PUBLIC OFFICE NOT SHOWN.—The complaint showing that the plaintiff is in the exercise of the office, and not alleging or suggesting that the defendant has usurped or intruded into the office, does not state a cause of action in *quo warranto*.

ID.—CONTEST OF ELECTION—STATUTORY GROUND NOT SHOWN.—The complaint showing that defendant wrongfully procured his nomination, or had his name illegally placed upon the tickets, does not show a statutory ground for contesting the election.

ID.—NOMINATION BY ELECTORS NOT NEGATIVED—PRESUMPTION—PERFORMANCE OF OFFICIAL DUTY.—The complaint not expressly negativing the nomination of the defendant by petition or certificate containing the signatures of a sufficient number of electors, and expressly showing that the clerk received the name of the defendant upon the ballots, and that a certificate of election had been issued to him, it must be presumed that official duty was regularly performed, and that the defendant was nominated and elected and duly received the certificate of election.

APPEAL from a judgment of the Superior Court of Solano County. A. J. Buckles, Judge.

The facts are stated in the opinion.

E. M. Billings, for Appellant.

Coghlan & Harvey, for Respondent.

COOPER, C.—A demurrer was sustained to plaintiff's amended complaint and judgment entered for defendant.

This appeal is from the judgment and for the purpose of reviewing the order sustaining the demurrer. The complaint alleges in substance as follows: That plaintiff was at the general election held in 1894 duly elected to the office of justice of the peace in the township of Suisun, county of Solano, and qualified, and has continued to, and was at the time of the commencement of this action, December 17, 1898, exercising the functions of such justice of the peace. That at a primary election held in said Suisun township, and at a Republican county convention held at the city of Vacaville, prior to the general election in November, 1898, the defendant claimed to have received the Republican nomination of Suisun township for the said office. That no secretary and chairman of any such convention ever certified any such nomination to the county clerk of said county, and that no delegates representing Suisun township ever organized or assembled together as a convention for the purpose of nominating any justice of the peace for said township, and that such Republican convention did not nominate defendant for such office. That the county clerk placed the defendant's name upon the tickets used at the general election held on the eighth day of November, 1898, but that by reason of the fact that defendant had not been properly nominated there was no legal election, and that plaintiff is entitled to hold over as justice of the peace by reason thereof. That there has been issued to defendant a certificate of election, and he will, unless restrained, attempt to exercise the duties and functions of the said office.

The prayer is for an injunction restraining the defendant from attempting to exercise the office of justice of the peace, and that it be decreed that plaintiff was legally elected to the said office. We think the demurrer was properly sustained. Counsel for appellant says in his brief: "The important and only question in this case is this: Can a man, by an unlawful process, obtain a nomination and retain the fruits accruing as the direct result of this wrongful act?"

There are two separate and distinct methods provided in the Code of Civil Procedure to test the title to an office. The first is by proceedings in the nature of *qua warranto* against any person who usurps or intrudes into a public office. (Code

Civ. Proc., secs. 802-10.) Here there is no allegation or suggestion that the defendant has usurped or intruded into any office, but, on the contrary, it is alleged that the plaintiff is still holding and exercising the office. Hence it cannot be claimed that this is a proceeding under the provisions of the above sections. The second is by contesting the election as provided in the Code of Civil Procedure, sections 1111 to 1127.

The latter method provides that any elector of a county or political subdivision thereof may contest the right of any person declared elected to an office to be exercised therein for any of the following causes: 1. For malconduct on the part of the board or judges or any member thereof; 2. When the person whose right to the office is contested was not at the time of the election eligible to such office; 3. When the person whose right is contested has given to any elector or inspector, judge, or clerk any bribe or reward, or has offered any such bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise defined in title IV, part I, of the Penal Code; 4. On account of illegal votes.

The complaint does not attempt to allege as grounds of contest any of the matters set forth in either of the said subdivisions. The right to contest an election is purely statutory, and must be determined in accordance with the terms of the statute. (*Austin v. Dick*, 100 Cal. 201; *Carlson v. Burt*, 111 Cal. 129.) The fact that defendant wrongfully procured his nomination or had his name illegally placed upon the tickets, not being within the provisions of section 1111 of the Code of Civil Procedure, is not ground for contest. (*Meredith v. Christy*, 64 Cal. 95.) The statute having provided a mode for contesting an election, that mode must be followed. (McCrary on Elections, secs. 436, 437; *Dickey v. Reed*, 78 Ill. 263.) Even if we should hold that this action in its present form can be maintained, and that if defendant's name was wrongfully placed upon the tickets it would be cause for declaring his election illegal, still the complaint would fail to state a cause of action. It states that the county clerk placed the name of defendant upon the ticket used at the election, and that a certificate of election has been

issued to him. We must presume that official duty was regularly performed. (Code Civ. Proc., sec. 1963, subd. 15; *Weaver v. Fairchild*, 50 Cal. 360.)

While the complaint attempts to show that defendant was not nominated for the office, it nowhere alleges or shows that he was not nominated by a petition or certificate containing the signatures of three per cent of the vote cast at the last preceding election in the township. (Pol. Code, sec. 1188.)

In the absence of an averment to the contrary, we must presume that the defendant was nominated and that he was elected, and the certificate of election duly issued to him.

The judgment should be affirmed.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

McFarland, J., Temple, J., Henshaw, J.

[L. A. Nos. 709, 729. Department One.—July 25, 1900.]

W. H. CLARK, Respondent, v. D. OYHARZABAL, Appellant.

SETTING ASIDE JUDGMENT BY DEFAULT—NONRECEIPT OF NOTICE OF OVERRULING OF DEMURRER.—Where a firm of attorneys had appeared for the defendant and demurred to the complaint, and notice of the overruling of the demurrer had been mailed to one of the members of the firm, if such member makes an uncontradicted affidavit that neither he nor the firm received the notice alleged to have been mailed to him, and that neither he nor the firm knew that the court had passed upon the demurrer until one week before notice was given of a motion to set aside a judgment by default taken against the defendant, the motion to set it aside should be granted.

APPEALS from a judgment of the Superior Court of Orange County and from an order refusing to set aside a default and judgment entered after demurrer overruled. J. W. Ballard, Judge.

The facts are stated in the opinion of the court.

Hazard & Harpham, for Appellant.

Z. B. Stuart, and H. W. Nisbet, for Respondent.

THE COURT.—Appeal by the defendant from an order denying a motion to set aside his default and the judgment entered against him after his demurrer to the complaint had been overruled. After the court had denied this motion the defendant took an appeal from the judgment, and also took a separate appeal from the order—the appeal from the judgment being case No. 709, and that from the order being No. 729. Although these appeals are presented in different records they were submitted together and have been considered together.

Notice of overruling the demurrer and of time to answer was given by mail, and was regular in all respects, except that it was addressed to George E. Harpham, instead of to Hazard & Harpham, who were the attorneys for the defendant. The motion to set aside the default was made on the affidavit of Harpham, in which he stated that neither he nor the firm of Hazard & Harpham, or the defendant, had any notice of the overruling of the demurrer until the 9th of December, and “that affiant did not receive the notice alleged to have been mailed to him . . . and did not know . . . and the firm of Hazard & Harpham did not know that the court had passed on said demurrer until December 9, 1898, and did not receive any notice thereof.” The motion was also supported by a proper affidavit of merits.

This affidavit of Harpham was uncontradicted, and—assuming it to be true, as we must—it shows that defendant’s attorneys were not in fact notified of the order of the court overruling their demurrer. The motion to open the default should therefore have been granted.

As under this determination the superior court will set aside the default and judgment thereon, it is unnecessary to consider the appeal from the judgment. The order appealed from in case No. 729 is reversed, and the superior court is directed to enter an order as of December 30, 1898, setting aside and vacating the judgment theretofore entered, and permitting the defendant to answer the complaint. Case No. 709 is remanded for further proceedings consistent therewith.

[Crim. No. 607. In Bank.—July 28, 1900.]

In re HUGH BUCHANAN, on Habeas Corpus.

CRIMINAL LAW—INSANITY OF DEFENDANT—COMMITMENT TO ASYLUM PENDING TRIAL—HABEAS CORPUS—RETURN FOR TRIAL.—Where a defendant accused of crime was committed to an insane asylum pending his trial, if the superintendent of the asylum does not return him for trial after he becomes sufficiently sane for the purposes of his defense, this court has the power, and it is its duty, upon *habeas corpus*, to order him into the custody of the court where the charge is pending against him.

ID.—QUESTION OF SANITY, HOW JUDGED—CONSTRUCTION OF STATUTE.—The question whether the defendant has become sufficiently sane to be tried is not to be judged according merely to the medical view of sanity or insanity, but is to be determined with reference to the statute, which is to be construed as in affirmance of the common-law principle that if a person arraigned for a crime is capable of understanding the nature and object of the proceedings against him, and can conduct his defense in a rational manner, he is deemed sane for the purpose of being tried, though on some other subjects his mind may be deranged or unsound.

ID.—UNDERSTANDING OF DEFENDANT—CLAIM OF RIGHT TO TRIAL.—Where it appears upon the examination had upon *habeas corpus* that the defendant reasons as other men do, that his memory is unimpaired, that he fully appreciates the nature of the criminal charge against him, and understands his position relative thereto, and is master of his own defense, and claims the right to a trial upon the criminal charge against him, the law sustains him in his claim.

HABEAS CORPUS in the Supreme Court to A. M. Gardner, Medical Superintendent of Napa State Hospital for the Insane, to determine the sanity of Hugh Buchanan, charged with murder in the Superior Court of Yuba County, and to obtain his return to said county for trial. E. A. Davis, Judge.

The facts are stated in the opinion of the court.

Theodore A. Bell, E. L. Webber, and Henry C. Gesford,
for Petitioner.

Tirey L. Ford, Attorney General, for the Respondent.

BEATTY, C. J.—Hugh Buchanan was brought to trial in Yuba county upon an information charging him with the crime of murder. After the trial had been several days in progress it was suspended upon a suggestion that the prisoner was then insane, and a special jury was formed for the trial of that issue. This jury, after hearing evidence and the instructions of the court, brought in a verdict to the effect that the defendant was insane, upon which he was committed to the insane asylum at Napa, now known as the Napa State Hospital, where he is still confined by Dr. A. M. Gardner, the medical superintendent of that institution, without other authority than said commitment. The proceedings in the superior court following the suggestion of the prisoner's insanity were those prescribed in sections 1367 to 1373 of the Penal Code, and the commitment conformed to the statute in directing the detention of the defendant in the insane asylum only until he should be sane (Pen. Code, sec. 1370), in which event it would become the duty of the superintendent to give immediate notice to the sheriff of Yuba county, and of the sheriff to return the prisoner without delay to the proper custody in order that the court might proceed with his trial. (Pen. Code, sec. 1372.)

It is now claimed in behalf of the prisoner that he has been for several years past entirely restored to sanity, and that his retention at the asylum has become unlawful. It is not claimed that he should be set at liberty, but that he should be returned, as the law provides, to the proper custody of the sheriff of Yuba county, and that he should have a speedy trial upon the charge of murder there pending against him.

There is no controversy, and none is possible, as to the soundness of this conclusion, if the prisoner has really become sane; but it is strongly insisted in behalf of the officers of the asylum not only that he is not sane, but that he can never become so, and this is the sole question now to be determined upon the voluminous record of conflicting evidence submitted at the hearing upon the return to our writ of *habeas corpus*.

A number of the more important questions originally pertaining to this controversy were finally determined in the case of *Gardner v. Jones*, 126 Cal. 614. That was an original

application to this court by the superintendent of the insane asylum for a writ of prohibition to the judge of the superior court, to prevent the hearing of a petition in behalf of Buchanan for the same relief sought in the present proceeding. It was there contended that the insanity law of 1897 (Stats. 1897, p. 311) has made the superintendent of the asylum the sole and final judge, in a case of this kind, whether the prisoner has become sane, and that the courts no longer have the power to conduct the inquiry by *habeas corpus*, or otherwise. It was held against this contention that the question of unlawful restraint of the liberty of a citizen is, and must be as long as our present constitution endures, a judicial question to be determined by the courts, and that the statute referred to would be unconstitutional if it required the construction contended for. The statute, however, was construed to mean nothing more than this: That it is the duty of the superintendent to send back a prisoner committed under sections 1367 to 1372 of the Penal Code as soon as he becomes sane, in order that the court may proceed to trial or judgment in his case; but if he does not do so the prisoner may assert his right to a speedy trial by means of the writ of *habeas corpus*, and that if the court after a hearing concludes that the prisoner is sane it has the power, and it is its duty, to order him into the custody of the court where the charge against him is pending, in order that that court may bring him to trial or pronounce judgment. In consequence of this decision the superior judge proceeded with the hearing upon return to the writ of *habeas corpus* issued by him, and having concluded upon the evidence that Buchanan was still insane, made an order remanding him to the custody of Dr. Gardner. Thereupon the present proceeding was commenced in this court, and upon the same evidence submitted to the superior judge, and some additional testimony, we must now decide the question of fact whether Buchanan has become sane.

The question, however, is not whether he has become sane in every sense of the word, but whether he has become sane in the sense of the statute, which requires a suspension of the proceedings in a criminal cause whenever it is found that the defendant is presently insane. In other words, if there is a

difference between the medical view of insanity and the view upon which the statute is founded, the question of sanity or insanity is to be determined with reference to the latter as contradistinguished from the former view. That there is such a difference is notorious, and is clearly illustrated by the testimony in the present case when compared with the origin and reason of the statutory provisions. These provisions establish nothing new in criminal procedure. They merely put in statutory form a well-known regulation of the common law—a regulation applicable to lunatics or madmen. Blackstone, in his Commentaries, after stating the rule that idiots and lunatics are not chargeable with their own acts, continues as follows: "Also, if a man in his sound memory commits a capital offense, and before arraignment for it he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried—for how can he make his defense? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced, and if after judgment he becomes of nonsane memory execution shall be stayed, for, peradventure, says the humanity of the English law, had the prisoner been of sound memory he might have alleged something in stay of judgment or execution." (4 Blackstone's Commentaries, 24.)

This short quotation shows what all the books and treaties and decisions on the subject show that the true and only reason why an insane person should not be tried is "that he is disabled by the act of God to make a just defense, if he have one." When the rule became a part of the common law, modern views of insanity were unknown. No sort of insanity was recognized except that which manifested itself in mental deficiency or in mental derangement. A congenital idiot, or a raving lunatic, was understood to be insane, but in the absence of any sensible loss of memory or material impairment of the intellectual faculties, a man was counted sane. If he could remember events and could reason logically, he was not within the letter or the reason of the rule which suspended proceedings against a madman or a lunatic. And if he was not within the common-law rule neither is he within the rule of the statute, which merely re-enacts the

common law and had no other purpose than to suspend proceedings against a defendant who is by reason of mental infirmity incapable of making his defense. A similar provision in the law of New York was very thoroughly considered in the case of *Freeman v. People*, 4 Denio. 9,¹ where the court, upon an elaborate review of the authorities, stated its conclusion as follows: "The statute is in affirmance of the common-law principle, and the reason on which the rule rests furnishes a key to what must have been the intention of the legislature. If, therefore, a person arraigned for a crime is capable of understanding the nature and object of the proceedings against him; if he rightly comprehends his own condition in reference to such proceedings and can conduct his defense in a rational manner, he is, for the purpose of being tried, to be deemed sane, although on some other subjects his mind may be deranged or unsound."

If this is the true construction of the New York statute, as I have no doubt it is, it is equally the true construction of our own, and it is very plain from the evidence before us that Buchanan is not now, and has not been for several years, insane in the sense of the statute. The evidence all shows that he is in possession of every faculty requisite to the defense of the accusation against him. His memory is unimpaired, and his reasoning faculties, although they may not be equal to the promise of his youth, are far above those of the average man. His insanity is of a character which does not manifest itself in any apparent weakness of intellect or failure of memory, but may be best described as a sort of chronic and latent disease of the brain, which under the excitement of intoxicating drink, to which he is predisposed, will lead him to the commission of criminal acts. To be more specific, it appears that until he was about twenty years of age he was particularly intelligent and precocious and distinguished by many amiable traits of character. About that time he began to indulge in the excessive use of intoxicating drink, the consequence of which was a serious illness which undoubtedly affected his brain. Upon his recovery, or partial recovery, after a protracted period of convalescence, it was discovered that his character was greatly changed. He

¹ 47 Am. Dec. 216.

had lost all ambition to excel in his chosen profession; he had become aimless and trifling; his moral character had deteriorated; he was alienated from his family and took up the life of a wanderer, going about from place to place and supporting himself by menial employments. At frequent intervals his appetite for intoxicants became uncontrollable, and when drinking he was disposed to acts of violence, besides being subject to occasional temporary delusions. The medical testimony based upon these facts is that his brain or its integument was permanently injured by the sickness above mentioned, and that his condition has been such ever since, and will so remain as long as he lives; that if set at liberty he will inevitably take to drinking, and that under the influence of intoxicants he will be dangerous. There is a very strong preponderance of expert testimony to this effect, and we cannot doubt that the medical gentlemen who have so testified are competent to decide such matters.

But this is a species of insanity which the statute governing this case does not contemplate. It is not such insanity as would disable him to make his defense. The same witnesses that testify that he is insane admit that during his long stay at the Napa asylum he has exhibited no symptom of insanity. He reasons as other men do, he has no delusions, he is more than ordinarily intelligent, his memory is unimpaired, he appreciates exactly the nature of the criminal charge against him, and his relations to the proceeding. As far as mental operations are concerned he is sane as men are ordinarily. According to the testimony of Dr. Smith, under whose care he was at Napa, if he had to judge alone by what he saw of him there he would be obliged to discharge him; and this testimony is strongly corroborated by all the other evidence, both professional and nonprofessional, as to his behavior at the asylum.

But the most conclusive evidence on this point is the testimony of Buchanan himself. He was not sworn as a witness, but he offered himself as an exhibit, and not only by his statement but by his appearance and bearing, both in the superior court and in this court, he showed a perfect possession of his faculties and complete ability to conduct his defense. He gave a connected and rational account of his whole life. He showed that he understood his position with respect to the

criminal charge pending against him, and that so far as his conduct is defensible or mitigable he is master of his defense. He sustained a long and searching cross-examination with perfect self-possession, and was not betrayed into the slightest inconsistency of statement. This being so he claims the right, and the law clearly sustains him in his claim, to a trial upon the criminal charge. If he is innocent he is entitled to have his innocence established. If he is guilty, there is nothing in his present condition to screen him from punishment. If, being found not guilty and discharged from custody, it is thought he should be put under restraint as a person dangerous to be at large, the law affords the means of having that fact adjudicated in a proper proceeding. So far, there never has been a proceeding in which his dangerous lunacy has been, or could be, adjudicated. All that was tried, or could be tried, in the proceeding in the superior court, was the question whether he was then deprived of his reason to such an extent that he could not make his defense to the charge of murder. The finding of the jury and the order of the court there made are conclusive upon that issue, but if the prisoner is to be kept under restraint his whole life long as a dangerous lunatic, some of the methods provided by law for determining that question must first be resorted to.

It is ordered that Hugh Buchanan be returned to the custody of the sheriff of Yuba county, that his trial in the superior court may be proceeded with.

Temple, J., Van Dyke, J., and Henshaw, J., concurred.

McFARLAND, J., dissenting.—I dissent. Leaving out of view, for the present, all questions of law arising in the case, I think that the preponderance of evidence is to the point that the sanity of the petitioner has not been "restored." To say nothing of any consideration to be given to the conclusion of a jury, a superior court, and the superintendent of the asylum, the evidence introduced in the present proceeding, in my opinion, preponderates against his restoration to sanity. The statutory provision in question says nothing about different kinds of insanity; and certainly a man not "sane" should not be put on his trial for murder.

GAROUTTE, J., concurring.—I have no doubt but that under the evidence disclosed by the record in this case the petitioner is insane within the meaning of that word as used in the law applicable to our state hospitals. But conceding that to be his mental condition, it is not necessarily a bar to his prosecution for the commission of a crime. The insanity which demands that a person at large should be confined in an asylum is not the same insanity which bars the prosecution of that person for the commission of a felony. While the petitioner is insane within the law applicable to state hospitals, I think him sane to the extent that he should be tried upon the charge pending against him in Yuba county.

I concur in the order.

[S. F. No. 1999. In Bank.—July 28, 1900.]

JOSEPH BRITTON, Appellant, v. BOARD OF ELECTION COMMISSIONERS OF THE CITY AND COUNTY OF SAN FRANCISCO et al., Respondents.

CONSTITUTIONAL LAW—PRIMARY ELECTIONS.—The additions made to the Political Code by the act approved March 3, 1899 (Stats. 1899, p. 47), constituting what is known as the "primary election law," are in violation of the bill of rights embodied in article I of the constitution of California, and of fundamental reserved rights growing out of the nature of free government, in that they prohibit the election of delegates to a convention of any political party not representing three per cent of the votes cast at the last election, and take away the rights of self-control and self-preservation from a political party, and allow members of any other party, or of no party, to vote for delegates to the party convention.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Myrick & Deering, and L. A. Gibbons, for Appellant.

The primary law is mandatory in its terms, and is violative of section 11 of article I of the constitution, and of subdivision 33 of section 25 of article IV, in that it does not have a uniform operation upon all political parties, and is special legislation in that regard. (*Fields v. Osborne*, 60 Conn. 544; 12 L. R. A. 552; *Eaton v. Brown*, 96 Cal. 375.¹) It deprives electors of their party choice of delegates, and to impair their right to vote their choice thus is to take away the substance of their rights. (*Spier v. Baker*, 120 Cal. 370; *Sanner v. Patton*, 155 Ill. 564; *Page v. Allen*, 58 Pa. St. 338²; *Moore v. Collins*, 17 Ohio St. 665; *State v. Dillon*, 32 Fla. 579; *Attorney General v. Detroit*, 78 Mich. 545³; *Dells v. Kennedy*, 49 Wis. 555⁴; *Daggett v. Hudson*, 43 Ohio St. 568.) It deprives illiterate voters of their constitutional right to a secret ballot. (Const., art. II, sec. 5; Cooley's Constitutional Limitations, 761; McCrary on Elections, sec. 453; *People v. Cicott*, 16 Mich. 285,⁵ per Campbell, J.; *Temple v. Mead*, 4 Vt. 535; *Druliner v. State*, 29 Ind. 308; *Fletcher v. Wall*, 172 Ill. 426; *Williams v. Stein*, 38 Ind. 89⁶; *Ritchie v. Richards*, 14 Utah, 375.) The law violates the bill of rights and the reserved rights of the people belonging to a political party to control and govern their own political party and their own primary election of delegates. (Const., art. I, secs. 1, 11, 23; 10 Am. & Eng. Ency. of Law, 2d ed., p. 643; *People v. Cavanaugh*, 112 Cal. 675; *State v. Johnson* (Mont., Oct. 22, 1896), 46 Pac. Rep. 534.)

W. B. Treadwell, *Amicus Curiae*, also for Appellant.

The nature of free government is an implied limitation on the power of the legislature. (Cooley's Constitutional Limitations, secs. 174-76; *Calder v. Bull*, 3 Dall. 386; *Loan Association v. Topeka*, 20 Wall, 655, 662, 663; *Durkee v. Janesville*, 28 Wis. 467⁷; *People v. Salem*, 20 Mich. 452.) Self-preservation is an inherent right of political parties, as well as of individuals. (*Whipple v. Broad*, 25 Colo. 407, per Mr. Justice Goddard.)

¹ 31 Am. St. Rep. 226.

² 98 Am. Dec. 272.

³ 18 Am. St. Rep. 458.

⁴ 35 Am. Rep. 786.

⁵ 97 Am. Dec. 141.

⁶ 10 Am. Rep. 97.

⁷ 9 Am. Rep. 500.

Franklin K. Lane, City and County Attorney, M. M. Estee, and Gavin McNab, for Respondents.

The primary election law is no more obnoxious to the constitution than section 1186 of the Political Code, which has been upheld, except as to the matter of voting a straight ticket. (*Eaton v. Brown*, 96 Cal. 371.⁸) The three per cent limitation is only a reasonable limitation, such as various courts have upheld. (McCrary on Elections, sec. 689; *De Walt v. Bartley*, 146 Pa. St. 543⁹; *State ex rel. Lewis v. Kinney*, 57 Ohio St. 221; *In re Contigue*, 14 Misc. Rep. 139; *Corcoran v. Bennett*, 20 R. I. 6; *Miner v. Olin*, 159 Mass. 489.) It does not appear that the plaintiff is without a party. The primary election law does not interfere with the rights of voters or of political parties. A voter may ally himself with any political party he chooses, but cannot vote for more than one party, as all voters of all parties must vote the same day and cannot vote but once. The law is rather a protection against the possibility or reasonable probability of the voters of one party interfering with the primaries of another, and thus disfranchising themselves in their own party. Double fraudulent voting in the primaries of opposite parties, which has heretofore taken place, is prevented by the law. All doubts must be resolved in favor of the law. (*Stockton etc. R. R. Co. v. Stockton*, 41 Cal. 147; *University of California v. Bernard*, 57 Cal. 613; *People v. Hayne*, 83 Cal. 111¹⁰; *Matter of Bonds of Madera Irr. Dist.*, 92 Cal. 296.¹¹) The court is not called upon to imagine a possible contingency in which its provisions may conflict with the constitution. (*Woodward v. Fruitvale Sanitary Dist.*, 99 Cal. 554.) The primary law adopts the safeguards of the general law, and is promotive of honest primary elections. A court of equity has no right to interfere by injunction with the conduct of a public election. (*Harris v. Schryock*, 82 Ill. 119; 2 High on Injunctions, 2d ed., sec. 1250.)

T. C. Spelling, *Amicus Curiae*, also for Respondents.

HENSHAW, J.—By an act approved March 3, 1899 (Stats. 1899, p. 47), the legislature added certain sections to the Political Code, providing thereby an exclusive scheme

⁸ 31 Am. St. Rep. 225.

⁹ 28 Am. St. Rep. 814.

¹⁰ 17 Am. St. Rep. 217.

¹¹ 27 Am. St. Rep. 106.

controlling political parties in holding their conventions for the nomination of candidates to public office. The act is known as the primary election law, and for convenience may be so designated. Plaintiff, a resident and taxpayer of the city and county of San Francisco, by his complaint sought an injunction against the defendants, constituting the board of election commissioners of San Francisco, to restrain them from expending the public moneys of the city and county under the terms of this law, alleging it to be unconstitutional and void. Defendants' general demurrer to the complaint was sustained, and plaintiff, declining to amend, appeals from the judgment against him which followed.

Conventions of political parties, consisting of representatives of the voters of such parties, assembled to deliberate and place in nomination their candidates for various public offices, have long been known in the history of this country. Heretofore the methods which political parties might adopt for the selection of delegates to such nominating conventions have usually been left to party organization, and the legislature has contended itself, when it has seen fit to act at all, with conservative, tentative, and permissive acts, such as found expression in the earlier primary law of this state, popularly called the Porter primary law. (Stats. 1865-66, p. 438.)

In 1897 the legislature made its first essay in mandatory and compulsory legislation touching the holding of primary elections. (Stats. 1897, p. 115.) That law was declared unconstitutional as imposing limitations and conditions upon the right of suffrage other than such as were named in the constitution itself, and grave doubt was expressed as to the power of the legislature to prescribe a voting test and impose it upon political parties and their members as a prerequisite to their right to participate in party affairs. (*Spier v. Baker*, 120 Cal. 370.)

In the present law the legislature has omitted certain obnoxious features found in the earlier act, but has introduced others which go to the essence of the legislation, and which we are earnestly told in argument are violative of the constitutional rights of the people, both express and implied.

That a compulsory primary law, such as this, forms a part

of the general election laws of the state is not, we think, debatable, and has been distinctly decided. (*Spier v. Baker, supra.*)

At the outset the law declares that all delegates to conventions of political parties for the purpose of making nominations of candidates for public offices shall be elected at elections conducted under the regulations in the act provided. There is at once to be perceived an express limitation upon the powers of political parties, which heretofore they have exercised, of adopting their own modes for the selection of their representatives. It is a part of the political history of this state and of the United States that such powers, whether resting in right or merely in the permissive silence of the legislature, have been freely enjoyed. In some instances political parties have had recourse to primary elections under such regulations and tests as the executive managers of the party might prescribe. In others, resort is had to the organization of precinct or district political clubs with an enrolled membership, the members thus duly entered having alone the right to select delegates to the nominating conventions.

We will not now stop to consider whether political parties have heretofore enjoyed these privileges as of right or merely under permission. We have referred to the matter only as illustrating the bold innovation of this legislation, and thus of an added necessity for a careful scrutiny and consideration of its terms. This much, however, we think will be freely conceded by advocate as well as by antagonist of the law, that if the legislature takes unto itself the regulation and control of these internal affairs of political parties, it must do so without discrimination and with equal consideration and benefit to all. With the wisdom or the policy of the law this court, of course, can have nothing to do, but, if the law be wise and beneficent, every organized political party must come under its cloak. If, upon the other hand, the law be unwise or inexpedient, none the less every political party must equally suffer the burden and bear the consequences.

But here we are confronted with a provision in this law denying its rights and privileges to all political parties

which did not cast at the next preceding election at least three per cent of the total vote. In other words, no matter how well organized a small political party may be, no matter how devoted its adherents may be to its tenets, they are denied a representation upon the primary ballot, cut off from all benefits of the law, prohibited from holding a nominating convention (because only under the provisions of this law can such a convention be held), and are thus absolutely debarred from the privileges and protection accorded to other political parties. This is not the case where the state, as matter of regulation when called upon to print ballots at public expense, restricts the names to be printed thereon to the parties polling a certain percentage of the votes. Even upon this question there has been a division in the courts, some holding it to be a mere matter of regulation and not an interference with the right of suffrage, and others maintaining that it confers a special privilege upon the stronger of the political parties. But where such laws have been upheld, the right of the voter freely to express his preference has always been preserved, as in this state, by blank spaces wherein he may write the names of the candidates of his choice. This law contains no such provision. Minor political parties are denied any right of representation upon the ballot, and are in effect forbidden to hold political conventions under the protection of the law. It is no answer to this to say that they may still cause the names of their nominees to be placed upon the election ballot by petition. The objection is not that they may not in some way preserve this important right, but that they are denied the means to accomplish this result by the holding of a convention, that they are denied the right freely to assemble under the protection of the law—a right preserved to them both by the constitution of the United States and of the state of California—while other political parties no differently situated, saving that they are numerically stronger, are given this right and protected by all of the machinery of the law in its exercise. Political conventions are, after all, but public assemblages of the people, having for their end the discussion of ways and means for the public good. By the declaration of rights of the constitution of this state the people have

the right to assemble freely to consult for the common good, to instruct their representatives and to petition the legislature for redress of grievances. (Const., art. I, sec. 10.) No citizen or class of citizens shall be granted privileges or or immunities which upon the same terms shall not be granted to all citizens (Const., art. I, sec. 21), and all laws of a general nature shall have a uniform operation. (Const., art. I, sec. 11.) How can it be said that a law which protects by legislation a certain number of citizens forming one political party, and deprives a fewer number of citizens forming another political party of the same protection, is not violative of these provisions? Or how shall it be said that a man belonging to a party holding certain political principles may not participate in a primary election, when his neighbor of different political faith is accorded the right so to do?

The case in this regard is identical in principle with the views expressed by Mr. Justice Garoutte in his concurring opinion in *Eaton v. Brown*, 96 Cal. 371, where he says: "It is very apparent, from the reading of the act that in both spirit and letter it was intended that only parties polling three per cent of the entire vote cast at the last general election should have a heading upon the ticket. Such being the fact, to my mind the law is clearly unconstitutional."

Moreover, if the legislature may deny the protection of its laws to a political party which has cast less than three per cent of the votes, why may it not deny the same right to a party which has cast forty-nine per cent of the votes? This is not a mere matter of regulation, as in the case of the election ballot. It is the deprivation of the one party and the conferring upon another of certain important political privileges, and answer to it cannot be made by saying that the three per cent limit is reasonable, while a forty-nine per cent limitation would be unreasonable. It is a question of power. Either the legislature has or has not the constitutional power so to do. If it has the power, the question of reasonableness or unreasonableness is for the legislature alone, and a court would no more be justified in overthrowing the law because it believed a forty-nine per cent limitation to be unreasonable than, in the absence of such power, it would be warranted in upholding a three per

cent limitation because it might believe it to be reasonable. And upon this we think that under the express limitations upon the power of the legislature in the sections of the constitution above adverted to, the legislature has not such power; for the effect of its act here under consideration is not only to discriminate between political parties and the members thereof, but absolutely to work the disfranchisement of voters, or to compel them, if they vote at all, to vote for representatives of political parties other than that to which they belong. The deprivation of the right of selection is a deprivation of the right of franchise.

It is further contended against this law that in its present state it works an unwarranted invasion of the rights of political parties, and this contention merits more than a passing notice. No one can be so ignorant as not to appreciate the value, indeed, the necessity, of opposing political parties in a government such as ours. No one, it would seem, can be so thoughtless as not to realize that government by the people is a progressive institution which seeks to give expression and effect to the wisest and best ideas of its members. No statement is needed in the declaration of rights to the effect that electors holding certain political principles in common may freely assemble, organize themselves into a political party, and use all legitimate means to carry their principles of government into active operation through the suffrages of their fellows. Such a right is fundamental. It is inherent in the very form and substance of our government, and needs no expression in its constitution. Says Judge Cooley, in discussing this general subject (*Cooley's Constitutional Limitations*, 174): "It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the constitution, some specific inhibition which has been disregarded, or some express command which has been disobeyed. Prohibitions are only important when they are in the nature of exceptions to a general grant of power; and if the authority to do an act has not been granted by the sovereign to its representatives, it cannot be necessary to prohibit its being done. . . . The right of local self-government cannot be taken away, because all our constitutions assume its continuance as the undoubted right of the people, and as an inseparable incident to republican govern-

ment. The bills of rights in the American constitutions forbid that parties shall be deprived of property except by the law of the land; but if the prohibition had been omitted, a legislative enactment to pass one man's property over to another would nevertheless be void. . . . There is difficulty in saying that any such act, which under pretense of exercising one power is usurping another, is opposed to the constitution and void. It is assuming a power which the people, if they have not granted it at all, have reserved to themselves."

As early as 1798 the supreme court of the United States, speaking through Mr. Justice Chase, in *Calder v. Bull*, 3 Dall, 386, said: "I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the state. The people of the United States erected their constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and, as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require, nor to refrain from acts which the laws permit. There are acts which the federal or state legislature cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power—as to authorize manifest injustice by positive law, or to take away that security for personal liberty or private property, for the protection whereof the government is established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority." And in *Loan Assn. v. Topeka*, 20 Wall. 655, that same tribunal declared: "It must be conceded

that there are such rights in every free government beyond the control of the state. . . . There are limitations on such power which grow out of the essential nature of all free governments—implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.”

Active political parties, parties in opposition to the dominant political party, are, as has been said, essential to the very existence of our government. The right of any number of men holding common political beliefs or governmental principles to advocate their views through party organization cannot be denied. As has been said: “Self-preservation is an inherent right of political parties, as well as of individuals.” (*Whipple v. Broad*, 25 Colo. 407.) A law which will destroy such party organization, or permit it fraudulently to pass into the hands of its political enemies, cannot be upheld. The procedure of political parties may be regulated, and the wisdom of the legislature may well be exercised in devising methods to check political corruption and fraud, but the legislature itself, under the guise of regulation, cannot be permitted to throw open the doors to these very abuses. A law authorizing or even permitting the opponents of an organized political party to name the delegates to the nominating convention of that party would not for a moment be countenanced. Yet that in effect is precisely what the act under consideration does permit. It provides that the primary elections of all political parties shall be held at the same time. To the intending voter at such primary one ticket is given. No question may be permitted touching his political affiliations, past, present, or future. The voter takes the ticket, retires into the privacy of the booth, and there, secretly—and not in violation of any law, but in strict accordance with the law—names such delegates as he desires to the political convention of one or another of the parties, whether he is a member of that party or not, whether he ever intends to become such a member or not. The result is apparent. The control of the party and of its affairs, the promulgation and advocacy of its principles, are taken from the hands of its honest members and turned over to the venal

and corrupt of other political parties, or of none at all. Masquerading thus under the name of one of the great political parties might be a convention of men authorized by this law to represent it and place upon the general election ballot as its candidates those whom they might select—a body of men whose sole purpose might be the disruption and destruction of the party whose representatives this law declared them to be. It is expressly announced in the declaration of rights that the enumeration therein contained shall not be construed to impair or deny other rights retained by the people. (Const., art. I, sec. 23.) A law which thus permits the disruption and misrepresentation of a political party is an innovation of these reserved rights. For the foregoing reasons the judgment of the trial court is reversed, with directions that it overrule the demurrer of defendants.

Van Dyke, J., and McFarland, J., concurred.

Beatty, C. J., dissented.

TEMPLE, J., concurring.—I concur in the judgment on the second ground discussed by Mr. Justice Henshaw, and for the following additional reasons:

The act itself recognizes the necessity of political parties, and they are in fact the instrumentalities through which the people govern. A political party is an association of citizens who agree on certain lines of policy; and the purpose for which it exists is to impose that policy upon the government. This can only be done by electing to office those who are in favor of such policy. It is for this that conventions are held and candidates selected. To do this it is absolutely necessary that the party shall be able to exclude from its conventions, and from controlling positions in the party, those who are not in accord with its principles. It must have the power to prescribe its own tests. It is the test that determines what the party shall be. To deprive the party of this power is to destroy it. No one would contend that the legislature can prescribe what the test shall be. If it could do this it could prescribe what parties shall exist. And then, parties sometimes divide on great public questions. In such case the party retaining the old name would have the right, by proper tests, to exclude those formerly affiliated with it, but who now differ. Unless a party can do all these things it has no se-

curity that the candidates put forth in its name represent its principles. And then the management and control of its organization may be taken out of its hands and given to its enemies. All this right of self-control the primary election law takes from the party organization. The party is destroyed, or may be, and the members practically denied the right of free suffrage.

And then there may happen to be a new party which did not exist at the previous election. Why should it, or, indeed, other political parties polling less than three per cent of the votes, be denied the benefit of the protection of this law—if it be a protection?

Harrison, J., concurred in the above opinion.

GAROUTTE, J., dissenting.—I dissent. In the Australian ballot law a declaration is found defining what constitutes a political party within the purview of the act; and then it is further declared that those parties are entitled to hold political conventions and nominate candidates for office. The vital element going to make up a political party under that act is that it shall have polled three per cent of the entire vote cast at the last election. The primary law does not attempt to define the phrase "political parties," but declares that only those political parties which polled three per cent of the total vote cast at the last election shall participate in primary elections. In other words, this is a declaration that only those political parties which are entitled to hold conventions and nominate candidates for office under the Australian ballot law are entitled to hold primary elections. It is thus apparent that the primary law refers to a great class of political parties. And if the political parties declared and recognized by the Australian ballot law form a constitutional class, then the primary law in dealing with that class of political parties is likewise constitutional. While the question has never been decided in this state, it has been decided in other states, and held, that a classification of parties upon the basis of a certain percentage of the total vote cast at the last election is not violative of constitutional provisions. Indeed, it seems

to me that the declaration of the state legislature found in the Australian ballot law as to what shall constitute a political party within the meaning of that act is constitutional legislation. For these reasons I do not deem the three per cent clause of the primary election law obnoxious to the constitution of this state. It may be further suggested that as the Australian ballot law does not recognize an organization as a party which failed to poll three per cent of the total vote cast at the last election, no substantial benefits could be derived by such a party in participating in primary elections; for the nominees of a convention composed of delegates selected at the primary election by such party would not be entitled to a place upon the ballot. It must be borne in mind always that the primary law in this regard is not dealing with voters as individuals, but with political parties as such. If the declaration found in the present Australian ballot law, defining what shall constitute a political party, had been in that law at the time *Eaton v. Brown*, 96 Cal. 371, was decided, I am not prepared to say that my views as there expressed would have been the same.

It may be further suggested that under the present law, the ballot being entirely secret, and every voter being allowed to cast his vote for the delegates of any party represented upon the ballot, the result is that Democratic voters may elect delegates to Republican conventions, and Republican voters may elect delegates to Democratic conventions, and thereby absolutely own and control the conventions of opposing political parties. I am not prepared to say that the existence of these conditions clearly renders a law unconstitutional which permits it. But I am prepared to say that a law of that character presents a most anomalous state of affairs.

[L. A. No. 653. Department One.—July 30, 1900.]

J. C. McCANN et al., Respondents, v. J. C. McMILLAN et al., Appellants.

MINING CLAIMS—VALIDITY OF RELOCATIONS—EVASION OF ANNUAL WORK.—A relocation made by mining claimants at the close of the year in the name of a nonresident, without his authority, under a pretense that they had abandoned their claims immediately prior to such relocation, with full knowledge that no annual work had been done or attempted, as required by the statute, and with intent to evade such requirement, and to preclude a subsequent valid location, has no validity or effect; and a location proper in form, made on the first day of the following year by another claimant, for failure of the former claimants to do the required annual work, is valid and effective.

ID.—ABANDONMENT OF CLAIMS—QUESTION OF INTENTION—FACTS AND CIRCUMSTANCES—INCONCLUSIVE TESTIMONY—SUPPORT OF FINDING. Abandonment of mining claims is a question of intention, which it is the province of the jury or the trial court to determine, in view of all the facts and circumstances of the case. The direct testimony of claimants that they abandoned the claims in controversy a few minutes before they relocated them in the name of another person is not conclusive; and a finding that they did not abandon them is supported, notwithstanding such testimony, where the facts and circumstances in evidence indicate its improbability, and justify the conclusion that there was no abandonment.

ID.—LOCATION OF BORAX CLAIMS—LODE CLAIMS—PLACER CLAIMS.—It is not material that locations of mineral claims containing deposits of borate material, or borax, should be described either as lode claims, or as placer claims; and notices stating "that we, the undersigned, have this day located this ground for borate mining purposes," and describing claims fifteen hundred feet long and six hundred feet wide, are sufficient as notices of placer claims.

ID.—REFERENCE TO MONUMENTS IN NOTICE—LIBERAL CONSTRUCTION.—Notices of location of mining claims are to be liberally construed; and references in a notice to an adjoining mine, and to the distance and direction of the claim from a named road and town, are presumed to be a sufficient reference to monuments to identify the claim.

ID.—MARKING OF BOUNDARIES—RECORD OF CLAIM.—Though the distinct marking of the boundaries of a mining claim upon the ground so that they can be readily traced is essential to a valid location, yet the statute does not require that the record of the claim shall state that it is so marked upon the ground.

ID.—DISTRICT RECORD BOOK—CUSTODY OF COUNTY CLERK.—Where the pleadings admit that the claims were located in a specified mining district, and the name of the recorder of that district is shown, a district record book showing records of locations in the district signed by such recorder, and produced by the county clerk, in pursuance of the act of 1897, then in force, comes from the proper custodian.

ID.—CUSTOM TO RECORD—SUPPLY OF EVIDENCE BY DEFENDANT.—Evidence introduced from the district record book of the claims both of the plaintiffs and of the defendants is some evidence that there was a rule or custom to record mining claims in the district; and the absence of the proof of such custom by the plaintiff, objected to by the defendants, is supplied by the defendants' introduction of the same records to prove their locations.

APPEAL from a judgment of the Superior Court of San Bernardino County and from an order denying a new trial.
Frank F. Oster, Judge.

The facts are stated in the opinion of the court.

Reddy, Campbell & Metson, for Appellants.

L. M. Sprecker, and Rolfe & Rolfe, for Respondents.

THE COURT.—Plaintiffs brought this action to quiet their title to three mining claims known as the Compromise, Handy, and Sixteen to One, situate in Calico mining district, San Bernardino county. Findings and judgment were for the plaintiffs, and defendant Barkley appeals from the judgment and from an order denying his motion for a new trial. Defendant McMillan answered, disclaiming all interest in the property involved.

A general outline of some material facts is essential to a comprehension of the points in controversy.

Prior to January 1, 1896, H. B. Stevens and Eugenia D. Porter located certain mining claims covering the same ground now claimed by plaintiffs under locations made by themselves on January 1, 1897, the validity of which is the ultimate question here involved. No assessment work was performed by the prior locators during the year 1896 on any of the claims. On December 28, 1896, said Stevens and Porter sold and conveyed their said claims to the defendant McMillan. On December 30, 1896, McMillan and one

C. E. Calm went upon said claims, and, as claimed by defendants, abandoned them, and afterward, upon the same day and the next, relocated them for and in the name of defendant Barkley. Plaintiffs made their alleged locations on the morning of January 1, 1897, assuming that the ground was then open to location.

Plaintiffs' title is controverted by appellant on each of two principal grounds, which will be noticed in their order.

1. That the ground in controversy was not open to location by the plaintiffs, because of the locations made for defendant Barkley on December 30, 1896.

That the locations made prior to 1896 and which were conveyed by Stevens and Porter to McMillan on December 28, 1896, were at that time valid locations is not questioned; and, but for the alleged abandonment of them by McMillan on December 30th, would have continued to be valid until midnight of December 31st, when the ground would become forfeited and vacant because no assessment work was done for the year 1896. The court found that the ground was not vacant at the time the Barkley locations were made, but was vacant on January 1, 1897, when plaintiffs made their locations, and therefore found, in effect, that there was no abandonment of the claims by McMillan on December 30th, but that he forfeited them by failing to do the assessment work on them, which failure left them vacant on January 1, 1897.

We think the finding that there was no abandonment is justified by the evidence. "Abandonment," as was said in *Myers v. Spooner*, 55 Cal. 260, "is a question of intention, and of this intention the jury were to judge in view of all the facts and circumstances of the case. It is true, as stated in the brief of counsel for appellants, that Leathe testified at the trial that there was no intention by him or his colocators to abandon the claims. But his testimony to that effect was not conclusive." They knew when they purchased the claims that the assessment work for 1896 had not been done, and that their title would expire with the expiration of the year. They intended, as was explicitly stated, to relocate for themselves; but to wait until January 1st would expose the claims to location by others who had an even chance

with them. They could not relocate before in anyone's name without an abandonment, and to say to each other that they abandoned, and within ten minutes, and without leaving the ground, locate them in the name of a person in New York, and thus burden an absent friend with mining claims which they assert were not, to them, worth doing the assessment work upon, is at least improbable. But we find at the conclusion of Mr. Calm's testimony the statement: "When I went on the ground on the 22d of January I did not look for tools. We had men on the ground at that time, and if I had seen tools they might have been theirs. I did not notice whether there were any tools there that did not belong to us or our men."

Who the witness meant by "we" or "us" is not stated. It nowhere appears that Barkley was at any time informed of the location having been made, or that he gave any directions or authority to have any work done. McMillan by his answer disclaimed all right, title, or interest in said claims or either of them; but he testified that he was there in January and April, 1897, and did work on the Mars in April of that year; that the Dauntless and Minerva also had work done upon them in 1897, and added, "I was there in possession of those claims"; that work was done in January and February, and that he was there in possession doing the work when the injunction was served.

McMillan further testified that he was on those claims on December 31st, the day after the alleged abandonment; that "there was no way of getting in there except on horseback, and I went to see if I could find a good place for a wagon road"; and that he was there on January 16th also.

Barkley's deposition was not taken, nor was there any evidence that he was ever informed that these mining claims were located in his name, or that work was being done for him, or that Calm or McMillan were his agents. Barkley's answer was verified by McMillan, but even that he did not do as agent, but as one of the defendants in an action in which he disclaimed all interest.

We have gone into this matter thus fully because of the direct testimony of McMillan and Calm to the alleged abandonment. It was for the trial court to determine the fact, and we think the circumstances justify the conclusion that there was no abandonment.

2. Appellant further contends that plaintiffs have not shown title because "there was no proof that the ground contained veins or lodes of mineral bearing rock in place."

It is said that the ground contained a deposit of borate material or borax, and that such deposits cannot be located as lode or lodes of mineral bearing rock in place.

The notices are "that we, the undersigned, have this day located this ground for borate mining purposes," and describe claims fifteen hundred feet long and six hundred feet wide, while appellant's locations describe them as lode claims.

But the point made is immaterial. It is said in *Lindley on Mines*, section 432: "That, generally speaking, the acts required to be performed in order to complete a valid location under the federal laws applicable to placers, are the same as required in cases of lode locations." (See, also, U. S. Rev. Stats., sec. 2329.) Appellant does not point out any defect in respondents' notices as notices of placer claims, and we perceive none.

It is further contended that the certificates or notices of location of respondents' mining claims do not describe them with reference to natural objects or permanent monuments, nor describe them as being distinctly marked on the ground so that the boundaries could be readily traced.

We think the reference in plaintiffs' location notices to natural objects or permanent monuments is sufficient. The Compromise location states that it is "bounded on the east by the Handy mine, and is one-quarter mile south of Borax road, and about three miles east of the town of Calico." The others are similarly described.

The defendant's notices similarly describe his locations. It may be presumed that if there were natural objects or permanent monuments that would better identify the location of these claims, both plaintiffs and defendant would have referred to them. Notices of location are to be liberally construed. (*Carter v. Bacigalupi*, 83 Cal. 187.)

As to the other branch of the objection, the statute does not require the record of a mining claim to show that it is

distinctly marked on the **ground** so that its boundaries can be readily traced. The **claim** must be so marked upon the ground, but the statement that it is so marked is not required to be inserted in the record. (U. S. Rev. Stats., sec. 2324.)

Upon the trial the plaintiffs offered in evidence what purported to be the record of their said mining claims, recorded in a book purporting to be the records of the Calico mining district. This record was produced by the county recorder of said San Bernardino county. Objection was made by defendant that the record must be accompanied by proof that there was such a district, that there was a rule or custom providing for a record, and that the book was kept by the lawful custodian of it.

This cause was tried while the mining act approved March 27, 1897, existed and was in force, and that act provided that the records of all mining districts should be transmitted to the county recorder of the respective counties in which the districts were situated, and that "thereafter copies of such records, certified by the county recorder, may be received in evidence with the same effect as the originals." These records were produced by the county recorder, the proper custodian. It was alleged in the complaint that these mining claims were situated in Calico mining district, and the allegation was not denied. It was also alleged in the complaint that H. R. Gregory was the duly acting recorder of said district, and there was oral evidence that he was such, and that the notices of location were left with him to be recorded, and the record of the locations was signed by him as such recorder. This evidence was corroborated by the defendant, who introduced the same book from the custody of the same officer to prove the recording of his claims, and these records were made by the same district recorder who was repeatedly spoken of by defendant's witnesses as the recorder of said district. If there were any defects in plaintiffs' evidence upon this point we think it was supplied by the defendant; and the production of volume 3 of the records of said district, as well as the fact that defendants, as well as plaintiffs, immediately procured their respective notices of location to be recorded by the recorder of said district, is at least some evidence that there was a rule or custom requiring it.

Our conclusion is that the findings are justified by the evidence, and that there are no errors which would justify a reversal of the judgment. The judgment and order are affirmed.

Hearing in Bank denied.

[L. A. No. 727. Department One.—July 30, 1900.]

HENRY MALLORY et al., Appellants, v. RACHEL J. SEE et al., Respondents.

NEW TRIAL—NOTICE OF INTENTION—LIMITATION OF TIME.—The time for serving and filing a notice of intention to move for a new trial is not necessarily limited by the time in which an appeal may be taken from the judgment; and, except in cases of laches or waiver, the time therefor is not limited otherwise than as expressed in section 659 of the Code of Civil Procedure.

ID.—WRITTEN NOTICE OF DECISION—CONSTRUCTION OF CODE.—The notice of decision required by section 659 of the Code of Civil Procedure is, by the terms of section 1010 of the same code, required to be in writing; and section 659 is to be construed as if the terms therein were "after written notice of the decision of the court."

ID.—ACTUAL NOTICE OF DECISION—AFFIDAVIT OF OPPOSITE PARTY—INTENT OF STATUTE—RUNNING OF TIME.—Mere actual notice of the decision of the court, not evidenced by written notice, or by facts establishing a legal waiver thereof, but proved merely by affidavit of the opposite party, cannot be a substitute for the written evidence of notice prescribed by the statute. The obvious intent of the statute cannot be thus defeated; and the time within which to give notice of intention to move for a new trial will only run from written notice of the decision, unless a waiver thereof is properly shown.

ID.—WAIVER OF WRITTEN NOTICE OF DECISION—RECORD PROOF.—The statutory provision requiring written notice of the decision of the court is solely for the benefit of the moving party, and may be waived by him; but it will only be deemed waived when the waiver is evidenced by some act or acquiescence of the moving party manifested by the record, files, or minutes of the court. Where the moving party has acted in open court or in the proceedings of the cause as if he had formal notice of the decision, his acts constitute a waiver of such formal notice.

APPEAL from an order of the Superior Court of San Luis Obispo County striking from the files a notice of intention to move for a new trial. E. P. Unangst, Judge.

The facts are stated in the opinion of the court.

Graves & Graves, and John A. Kimball, for Appellants.

Venable & Goodchild, for Respondents.

SMITH, C.—The superior court made an order striking from the files the notice of intention to move for new trial. The respondents contend that the notice of intention was too late: 1. Because filed more than six months after judgment; and 2. Because filed more than ten days after actual notice of the decision.

1. On the first point it is contended that by the expiration of the time allowed for appeal a judgment becomes final, and can no longer be reviewed, either directly or indirectly, by motion for new trial. Hence, it is claimed, the time allowed by section 659 of the Code of Civil Procedure for filing the motion is to be regarded as limited to the period of six months allowed for appeal from the judgment. Numerous sections of the Code of Civil Procedure and several cases are cited in support of this contention, but do not seem to sustain it. Nor is there anything in the section itself to indicate such intention. We must hold, therefore, that—unless by the general principles of the law, in cases of laches—there is no limit of time for filing the notice other than that expressed in the section.

2. No written notice of the filing of the decision was given, but it is claimed that the notice of intention was filed “more than ten days after appellants had actual notice of the decision.” Two affidavits were filed in support of this contention—one by one of the defendants, to the effect that she had informed one of the plaintiffs that judgment had been entered, and that thereupon “both plaintiffs and defendants commenced to use the water” in controversy under, and as prescribed by, said judgment; the other, by one of defendants’ attorneys to the effect that after the judge had decided that plaintiffs were entitled to the use of the water in suit for four, and defendants for three, days in each week an agreement was made between him and one of plaintiff’s attorneys

that "plaintiffs' time should commence, and defendants' time end, at noon of each Sunday"; and that under this agreement the conclusions of law and judgment so provided. These allegations are not denied.

It can hardly be doubted—if we apply to the case the ordinary rules of evidence—that the plaintiffs had actual notice or knowledge of the decision; that is to say, not necessarily of the date, but of the fact. Plaintiff's attorneys were informed of the judge's decision, and agreed upon terms to be embodied in the written decision and judgment about to be filed, and which were filed accordingly; and immediately thereafter all the parties commenced to use the water as prescribed in the judgment. If, therefore, the rule is as claimed by respondents—that is to say, if the time prescribed by section 659 of the Code of Civil Procedure commences to run from the time of actual notice or knowledge to the party moving for a new trial, we would have to sustain the order appealed from.

But to hold this would be to go beyond any case yet decided, and, we think, beyond the intention not only of the statute, but of any of the decisions.

The notice prescribed in section 659 of the Code of Civil Procedure is, by an express provision of the code, a notice "in writing." (Code Civ. Proc., sec. 1010; *Forni v. Yoell*, 99 Cal. 176; *Biagi v. Howes*, 66 Cal. 470.) The provisions of the code are therefore essentially identical with those of the old practice act, which prescribed "written notice," and hence the decisions under the latter apply here. (*Sawyer v. San Francisco*, 50 Cal. 370; *Roussin v. Stewart*, 33 Cal. 208; *Burnett v. Stearns*, 33 Cal. 468; *Carpentier v. Thurston*, 30 Cal. 123; *Borland v. Thornton*, 12 Cal. 446.) The last case refers to a notice to dissolve an injunction, of which it is said: "When the statute speaks of notice it means written notice, or notice in open court, of which a minute is made by the clerk." The others refer to notices of filing of decision; and all hold that the notice prescribed by the statute is written notice. The provision in section 659 of the Code of Civil Procedure must, therefore, be read as though the terms were "after written notice of the decision of the court," as is in fact held in the two cases first cited *supra*.

But this provision of the statute is subject to the rule, universal in its application, that "anyone may waive the advantage of a law intended solely for his benefit." (Civ. Code, sec. 3513; *Forni v. Yoell*, *supra*.) And "when a party acts as if he had formal notice of a decision, such acts constitute a waiver of such formal notice." (*Gray v. Winder*, 77 Cal. 527.)

In the case cited the plaintiffs (who afterward moved for new trial) were present in court, objected to the findings and asked for further findings, which were thereupon made and filed, which was held to be a waiver.

The same rule was held to apply in the following cases, namely: *O'Neil v. Donahue*, 57 Cal. 231, where defendant (who afterward moved for new trial) served the plaintiff with notice of decision; *Barron v. Deleval*, 58 Cal. 97, where "appellant waived his right to a written notice [of ruling on demurrer] by applying to the court for leave to answer"; *Thorne v. Finn*, 69 Cal. 254, where defendants had given a previous notice of intention to move for new trial; *Mullally v. Benevolent Soc.*, 69 Cal. 560, a similar case; *Forni v. Yoell*, *supra*, where defendants had moved to dismiss the action because the findings had been filed more than six months without the entry of judgment; and *California Imp. Co. v. Baroteau*, 116 Cal. 137, where appellant had moved to modify and set aside the findings of fact and conclusions of law.

In all the cases cited—which, with exceptions to be noted presently, include all the cases on the subject that have been brought to our attention—the decision was put upon the ground that written notice of the filing of the decision had been waived; and in every case the waiver was evidenced by some act or acquiescence of the party in open court or in the proceedings in the case, appearing from the records, files or minutes. The rule would therefore seem to be that written notice of filing of decision is in all cases required, unless waived by facts appearing in the records, files, or minutes of the court; and it follows that actual notice or knowledge, other than by written notice, is insufficient in any case unless it appears, from facts thus evidenced, that written notice was waived. This is in effect held to be the rule in *Forni v. Yoell*, *supra*, where the distinction between actual notice and waiver is pointed out and explained.

The only case in which this principle has been departed from is that of *Dow v. Ross*, 90 Cal. 563, where actual knowledge, appearing from the affidavit of the moving party, was held to be sufficient to dispense with written notice; though in fact there was no evidence of waiver. But to adopt this rule would be to substitute for the written evidence prescribed by the statute, or the record evidence hitherto allowed by the court, the less satisfactory evidence of affidavits of interested parties; and thus to defeat the obvious intent of the statute.

We have cited the case of *Biagi v. Howes*, *supra*, on the point that the notice prescribed by section 659 of the Code of Civil Procedure is "notice in writing," and hence that the party intending to move for a new trial has a right to wait for such notice. To this extent the case has never been overruled, and it is, as we have said, in effect affirmed by the decision in *Forni v. Yoell*, *supra*; though, of course, the written notice prescribed may be waived.

We therefore advise that the order of the court below striking from the files of the court plaintiffs' notice of intention to move for a new trial be vacated and set aside and the cause remanded for further proceedings.

Chipman, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the order of the court below striking from the files of the court plaintiffs' notice of intention to move for a new trial is vacated and set aside and the cause remanded for further proceedings.

Temple, J., Harrison, J., Garoutte, J.

[L. A. No. 893. Department One.—July 30, 1900.]

COUNTY OF KERN, Respondent, v. CHARLES A. LEE
et al., Appellants.

MINING CLAIMS—RECORD OF LOCATIONS AND PROOFS OF LABOR—PERMISSIVE LAW—DUTY OF RECORDER—ACTION UPON BOND FOR FEES.—

Notwithstanding the repeal of the state mining law of 1897, which required all notices of location of mining claims and proofs of annual labor to be recorded in the county recorder's office, the permissive record thereof still allowed by the amendment of 1897, to section 1159 of the Civil Code makes it the duty of the county recorder, by the terms of the County Government Act, to record them, and to pay the fees received therefor into the county treasury, and, upon his failure to do so, an action will lie upon his official bond to recover the fees received by him for such record.

ID.—VALIDITY AND EFFECT OF RECORD NOT INVOLVED.—The validity or invalidity of the records as evidence of title or notice of claim is not involved in an action based upon the duty of the recorder to record instruments permitted by law to be recorded. Such duty does not depend upon the validity or effect of the instrument offered for record, or of the record thereof.

APPEAL from a judgment of the Superior Court of Kern County. W. B. Wallace, Judge.

The facts are stated in the opinion.

Laird & Packard, and Rolfe & Rolfe, for Appellants.

J. W. Ahern, District Attorney, for Respondent.

HAYNES, C.—This action was brought by the county of Kern against Charles A. Lee, the county recorder of said county, and the sureties on his official bond, to recover eight hundred and twenty-eight dollars and sixty cents alleged to have been received by said recorder for recording notices of mining locations and proofs of labor thereon, between the first day of July, 1899, and the commencement of this action, viz., October 3, 1899, the complaint further alleging that he had retained and appropriated the same to his own use.

The defendants demurred upon the ground that the complaint did not state a cause of action, the demurrer was overruled, and, the defendants declining to answer, judgment was entered against them, and they appeal.

Appellants contend that between the dates covered by the complaint there was no law either authorizing or requiring notices of mining locations, or proofs of the performance of work thereon, to be recorded, and therefore the recording of them was voluntary and no part of the recorder's official duty. If this be true, the demurrer should have been sustained under the authority of *San Bernardino County v. Davidson*, 112 Cal. 503, cited by appellants.

The state mining law of 1897 required notices of mining locations and proofs of the performance of labor to be recorded in the county recorder's office. and declared that no record of a mining claim or millsite thereafter made in the office of the recorder of a mining district should be valid. (Stats. 1897, sec. 7, p. 214.)

On March 20, 1899, the act of 1897 was repealed, and the repealing act was given immediate effect. (Stats. 1899, p. 148.)

The act of 1897 prescribed what the preliminary notice of location and the certificate of location should respectively state, and after the repeal of that act we had no state law prescribing what a notice of location should contain. It has, however, from the inception of mining in this state been the common practice of the locators of mines to make written notices of locations, and this was recognized by the subsequent act of Congress (U. S. Rev. Stats., sec. 2324) permitting miners of a district to make regulations governing, among other things, the "manner of recording" their claims; but it is true the act of Congress did not in terms make the recording of location notices compulsory, and it has been repeatedly held that in the absence of a state or district requirement, the failure to record notices of location does not affect the validity of the location. (*Carter v. Bacigalupi*, 83 Cal. 188.)

It is therefore conceded that, during the time covered by the complaint, there was no law requiring these notices and proofs of labor to be recorded; but it is contended by respondent that the law authorized them to be recorded; and, if that

be true, the option whether they be recorded or not was with the mine owner and not with the recorder, and it was the recorder's official duty to record them when presented, upon payment of the fees prescribed by law. The question, therefore, is whether the law authorized or permitted these notices and proofs to be recorded.

The County Government Act (Stats. 1897, sec. 120, p. 484), prescribing the duties of the county recorder, provides: "He must, upon the payment of his fees for the same, record separately . . . 12. Such other writing as are required or permitted by law to be recorded."

Section 1159 of the Civil Code, as amended March 9, 1897 (Stats. 1897, p. 97), provides: "Judgments affecting title to real property . . . and notices of location of mining claims may be recorded, without acknowledgment, or certificate of acknowledgment, or further proof . . . Affidavits showing work or posting of notices upon mining claims may also be recorded in the recorder's office of the county where such mining claims are situated."

It is not necessary to pass upon the validity or invalidity of these records as evidence of title or notice of claim, since the duty of the recorder to record them, or any other instrument, does not depend upon the validity of the instrument offered for record, or the effect of the record, but upon the statute prescribing what may be recorded. The article in which said section occurs is devoted solely to "what may be recorded," and not to the validity or effect of the instrument or of the record of it.

The case of *San Bernardino County v. Davidson*, *supra*, upon which appellants rely, was decided in this court in 1896, prior to said amendment of said section, and the decision was based upon the fact that "the statute concerning county recorders makes no provision for the recording of notices of location of mining claims." That decision was right as the statute then stood, and is not in conflict with our conclusion that the judgment here appealed from should be affirmed.

Cooper, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

Hearing in Bank denied.

[Crim. No. 610. Department One.—July 30, 1900.]

THE PEOPLE, Respondent, v. LEN. GARNETT, Appellant.

CRIMINAL LAW—ACCESSARIES—CONCEALING KNOWN FELONY—PROTECTING PERSON CHARGED—CONSTRUCTION OF PENAL CODE.—Under section 32 of the Penal Code, which provides that "all persons who, after full knowledge that a felony has been committed, conceal it from the magistrate, or harbor and protect the person charged therewith, or convicted thereof, are accessaries," the word "conceal" means more than mere silence or a simple withholding of knowledge that a felony has been committed, and necessarily includes some affirmative act tending toward the concealment of its commission; and the word "charged" imports a formal complaint, information, indictment, or arrest upon a criminal charge, and does not include mere general rumors and common talk that a person has committed a felony.

ID.—ACCESSARY TO GRAND LARCENY—GOOD AND BAD CHARGES IN INFORMATION—VERDICT NOT SUPPORTED—NEW TRIAL.—An information accusing a defendant of being an accessory to the crime of grand larceny, under two charges that he did willfully "conceal" the felony from the magistrate, after full knowledge that it had been committed, and did "harbor and protect" the person who committed the crime, without alleging that such person was "charged with a felony," is insufficient, and amounts to nothing as respects the charge of harboring and protecting such person. Where evidence was introduced under both charges, and both were considered by the jury, a verdict of "guilty as charged in the information" cannot be supported, and a new trial must be granted.

ID.—INSUFFICIENT CHARGE SHOULD BE KEPT FROM JURY.—The insufficient charge in the information should have been kept from the jury, and no evidence should have been allowed thereunder. The case should have been tried upon the sole theory that the defendant was charged with concealing the commission of the felony from the magistrate.

APPEAL from a judgment of the Superior Court of

Fresno County and from an order denying a new trial. J. R. Webb, Judge.

The verdict was in the usual form, "guilty as charged in the information." Further facts are stated in the opinion of the court.

Lewis H. Smith, Frank H. Short, and W. D. Crichton, for Appellant.

The words "charged with or convicted of a felony" import that the "charge" must be made in some legal proceeding. (*State v. Duncan*, 9 Port. 260; *Ryan v. People*, 79 N. Y. 598; *Day v. Otis*, 8 Allen, 477.) The word "the" magistrate particularizes the offense of concealing the felony. (25 Am. & Eng. Ency. of Law, 1019, 1020; *Stewart v. Duncan*, 40 Minn. 410.) There must be some positive acts of concealment from the magistrate, which ought to be stated in the information. (Pen. Code, sec. 950; *Jones v. State*, 14 Ind. 120; *Bowles v. State*, 13 Ind. 427.)

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

It is sufficient to charge the crime in the language of the statute. Over-nice exceptions are not to be encouraged in cases not touching the life of the defendant. (*Sherban v. Commonwealth*, 8 Watts, 212.) Where, in defining an offense, a statute enumerates a series of acts, either of which, separately or all together, may constitute the offense, all such acts may be charged in a single count, for the reason that, notwithstanding each act may by itself constitute the offense, all of them together do no more, and likewise constitute but one and the same offense. (*People v. Frank*, 28 Cal. 513; *Ex parte McCarthy*, 72 Cal. 385; *People v. Harrold*, 84 Cal. 569; *People v. Gosset*, 93 Cal. 643.) And where the statute enumerates two acts disjunctively, which separately or together may constitute an offense, and the indictment charges both conjunctively, as was done in the information in the case at bar, evidence of both or either will sustain a verdict of guilty. (*People v. Mitchell*, 92 Cal. 590.)

GAROUTTE, J.—Defendant was convicted of being an accessory to the crime of grand larceny. Section 32 of the Penal Code under which he was convicted reads as follows: "All persons who after full knowledge that a felony has been committed conceal it from the magistrate or harbor and protect the person charged with or convicted thereof, are accessories."

The aforesaid section is not as plain and explicit as it might be by any means. At the same time the word "conceal," as here used, means more than a simple withholding of knowledge possessed by a party that a felony has been committed. This concealment necessarily includes the element of some affirmative act upon the part of the person tending to or looking toward the concealment of the commission of the felony. Mere silence after knowledge of its commission is not sufficient to constitute the party an accessory. Again the word "charged," as used in the section, means a formal complaint, information or indictment filed against the criminal, or possibly an arrest without warrant might be sufficient. Mere general rumors and common talk that a party has committed a felony is wholly insufficient to fill the measure required by the word "charged."

Passing the consideration of other matters found in the information, we find it charging that one Lewis committed the crime of grand larceny, and that defendant Garnett "did, after full knowledge that the said felony had been committed as aforesaid, willfully . . . then and there conceal said felony from the magistrate, and harbor and protect said Laura Trixie Lewis by aiding and assisting said Laura Trixie Lewis in escaping from the county of Fresno, state of California, and by harboring and concealing said Laura Trixie Lewis from the officers and protecting her from arrest and punishment for the commission of said crime, with the intent and purpose then and there on the part of said Len. Garnett to conceal the crime committed by the said Laura Trixie Lewis from the magistrate, with full knowledge at that time that said Laura Trixie Lewis had committed said crime in the aforesaid manner, and that said crime was a felony."

We find no allegation in the aforesaid information that Lewis was charged with a felony. Hence, that branch of the

information which charges the defendant Garnett with harboring and protecting her amounts to nothing. By reason of the failure to make this allegation all evidence tending to support this branch of the information should have been kept from the jury, and the case tried on the theory alone that the defendant concealed the commission of the felony from the magistrate. Upon the contrary, evidence was submitted upon both branches of the information, and both branches thereof were considered by the jury. This fact is evidenced by the instructions of the court. For these reasons the case must be remanded for a new hearing. It is impossible to say from the verdict that the defendant was convicted of being an accessory by reason of his harboring and protecting Trixie Lewis.

This case in principle is identical with *People v. Mitchell*, 92 Cal. 590, and the reasoning of that case is conclusive here. While there the information was defective in both branches, still the principle discussed and decided has equal force and bearing. We do not deem it necessary to consider the various other questions raised by counsel for appellant.

For the foregoing reasons the judgment and order are reversed and the cause remanded for a new trial.

Van Dyke, J., and Harrison, J., concurred.

[Sac. No. 622. Department One.—July 30, 1900.]

L. E. RICHTER, Respondent, v. UNION LAND AND STOCK COMPANY, Appellant.

DEED OF WATER RIGHT—CONTRACT FOR DELIVERY—TOTAL FAILURE OF CONSIDERATION—RECOVERY BACK OF MONEY PAID.—An action may be maintained to recover back the consideration paid in money for a conveyance of the right to a sufficient quantity of water perpetually to irrigate plaintiff's land at all proper and seasonable times for the irrigation thereof, accompanied by a contract to deliver the water in an open ditch at the most convenient point on the margin of plaintiff's land, where there is a total failure of consideration, owing to an entire breach of the contract, and the entire worthlessness of the deed.

ID.—CONSTRUCTION OF CONTRACT—DELIVERY OF WATER AT PROPER AND SEASONABLE TIMES FOR IRRIGATION.—The contract to deliver the water “at all proper and seasonable times for the irrigation of said land” is to be construed as referring only to the recurring seasons of the year suitable for irrigation, and not as requiring the land to be cleared, ploughed, fenced, or improved as a condition precedent to the defendant’s obligation to deliver the water. Where it appears that the defendant did not deliver the water at any season of the year, no allegation or finding that a proper and seasonable time has existed” is necessary.

ID.—EXECUTORY CONTRACT—NONPERFORMANCE—FAILURE OF CONSIDERATION—RESCISSION—DAMAGES.—In all executory contracts the several obligations of the parties constitute to each reciprocally the consideration of the contract, and a failure to perform the contract constitutes a failure of consideration—either partial or total, as the case may be—within the meaning of section 1689 of the Civil Code, providing for a rescission of the contract for such failure. The remedy for the breach of the contract is not confined to an action for damages.

ID.—RECOVERY OF CONSIDERATION PAID—RESCISSION BEFORE SUIT—TOTAL FAILURE OF CONSIDERATION—IMPLIED PROMISE TO REPAY.—Where there is a total failure of consideration under an executory contract, and nothing of value has been received under the contract by the party seeking to rescind, it is not necessary that a formal rescission of the contract be made before bringing suit; but an action can be maintained to recover the consideration paid to the other party, under an implied promise for repayment.

ID.—RULES OF DILIGENCE AND LACHES INAPPLICABLE—ESTOPPEL OF DEFENDANT.—In an action involving the rescission of an executory contract, to recover the consideration paid as money had and received to the plaintiff’s use, in case of total failure of consideration on the part of the defendant, the authorities bearing upon the questions of diligence and laches do not apply. The defendant in default cannot object that the plaintiff waited too long to bring such action.

ID.—DEED OF WATER RIGHT TO BE DELIVERED—OBLIGATION IN FUTURE—EXTINGUISHMENT BY JUDGMENT.—A deed of the perpetual right to a sufficient amount of water to irrigate the land of the grantee, to be taken from the water system of the grantor and delivered by the grantor in a ditch to be constructed to such land, cannot operate as a grant until delivery of the water, and creates merely an obligation to be performed by the grantor *in futuro*, which is extinguished by a judgment for recovery back of the purchase money paid, because of total failure of the consideration.

ID.—ABSENCE OF VALUE—SUPPORT OF FINDING—LEGAL CONCLUSION.—A finding that such deed has no value either to plaintiff or the defendant is supported by proof of total nonperformance of the obligation to be performed by the grantor *in futuro*, and is a

necessary legal conclusion from findings that defendant never delivered any water to the plaintiff, and had done nothing toward performing its promises and agreements, and that plaintiff received nothing of value from defendant under and by virtue of said water deed or grant.

ID.—PLEADING—FAILURE TO ALLEGE ABSENCE OF VALUE.—The failure of the plaintiff to allege specifically in the complaint that the water deed and grant was of no value is immaterial, where facts are alleged from which that fact appears as a necessary conclusion.

ID.—STATUTE OF LIMITATIONS—WRITTEN CONTRACT—REASONABLE TIME FOR DELIVERY OF WATER—ORAL AGREEMENT AS TO TIME.—An action founded upon the written contract between the parties for the delivery of water, construed as a contract to deliver it within a reasonable time, and interpreted under an admissible oral agreement of the parties, fixing a specified time as the limit for such delivery, is not barred by the provisions of section 337 of the Code of Civil Procedure, where the required delivery was less than four years before the commencement of the action.

ID.—LIMITATIONS INAPPLICABLE—FRAUD—OTHER RELIEF.—Where no fraud is charged in the complaint, and the action is not for relief on the ground of fraud or mistake, but is based upon an obligation growing out of failure to perform a written contract, upon which no cause of action arose until within four years before the commencement of the suit, the limitations prescribed by subdivision 4 of section 339 and by section 343 of the Code of Civil Procedure are inapplicable.

ID.—ELECTION TO RESCIND CONTRACT AND RECOVER MONEY PAID—RUNNING OF STATUTE AS TO IMPLIED CONTRACT.—The plaintiff had the election to treat the contract as still subsisting, notwithstanding any breach of it, and the limitation of subdivision 1 of section 339, referring to actions on contracts "not founded upon an instrument of writing," could not begin to run against an action to recover the purchase money for total failure of consideration of the contract until the plaintiff made his election to rely no longer upon the contract, and to sue for the money paid to the defendant under it.

ID.—INTEREST ON AMOUNT RECOVERED.—Legal interest may be allowed on the amount recovered for money paid under the contract from the date of the payment thereof.

APPEAL from a judgment of the Superior Court of Lassen County and from an order denying a new trial. F. A. Kelley, Judge.

The facts are stated in the opinion.

A. L. Shinn, and J. E. Pardee, for Appellant.

Goodwin & Goodwin, for Respondent.

SMITH, C.—The plaintiff recovered judgment for the sum of eight hundred dollars, with interest from April 16, 1892, and costs—the principal sum adjudged being the amount of the consideration paid by the plaintiff to the defendant on a contract of the date named which the defendant had failed to perform.

The defendant appeals from the judgment and from an order denying a new trial. The material facts, as disclosed by the pleadings and findings, are as follows: The contract in question was accompanied, or rather preceded, by a deed of the same date from the defendant to the plaintiff purporting—for the consideration of eight hundred dollars in hand paid—to convey to the plaintiff “a perpetual water right for a sufficient quantity of water to properly and fully irrigate [the land described in the deed]; said water to be taken and used from the water system belonging to the party of the first part on Red Rock creek in said county,” and the use of the water to be restricted to the land described.

By the contract—which was executed by both parties—the defendant agreed “to deliver in an open ditch, at the most convenient point on the margin of the [land described in the deed], at all proper and seasonable times for the irrigation of said land, a sufficient quantity of water to fully and properly irrigate the said land for the raising of all kinds of agricultural crops, each and every year perpetually”; and plaintiff agreed to pay therefor certain water rates.

The contract contained a proviso that the defendant should “not be liable in damages for a deficiency in water caused by drought, hostile diversion, forcible entry, temporary damages by flood or other accident”; and also the agreement, “that the grant this day made of water to irrigate said land, and hereinafter mentioned, shall be and is subordinate to this agreement.”

The land referred to in the deed and contract was, at the date thereof, public land of the United States; and the defendant—who at the time was engaged in the construction of its water system, consisting of a storage reservoir on Red Rock creek, and distributing canals and ditches leading therefrom—by its agent suggested to the plaintiff the acquisition of

this land from the government, and represented to him that the work on its water system would be prosecuted with due diligence and completed as soon as practicable; and thereupon, on the same day, before the execution of the deed and contract, but in contemplation of their execution, the plaintiff, relying on these representations, filed in the United States land office, under the provisions of the Revised Statutes for such cases made and provided, his declaration of intention to reclaim the said land, and paid the required fee. The deed and contract were then executed, and the consideration named (eight hundred dollars) paid.

It is found by the court "*that defendant has never completed said reservoir or completed the canals or ditches leading therefrom, and has not constructed a ditch nearer than one and one-half miles of plaintiff's said lands, though defendant could have done so by the first day of January, 1896, had it used due or any diligence in prosecuting its said work as it promised plaintiff it would do. That defendant failed to deliver any water, etc.; . . . that defendant prosecuted its work with due diligence until the summer of 1895, when said defendant ceased to work thereon, and since said time . . . has done nothing toward performing its promises and agreements hereinbefore set forth; that plaintiff received nothing of value from defendant under or by virtue of said water deed or grant, and that said deed or grant is of no value either to plaintiff or defendant.*"

The two passages italicized indicate the portions of the finding objected to in the specifications of insufficiency of the evidence. With regard to the first, the specification is probably insufficient; but the case will not be materially affected if we substitute for the passage objected to the facts admitted on the trial and referred to in the specification—to wit, "that the said reservoir and canals leading therefrom were completed prior to 1893 to such an extent that defendant could have delivered water to the land of plaintiff by making a distributing ditch from the main canal to said canal; . . . and . . . that the defendant has had sufficient water, and could have delivered the same to plaintiff each year until the spring of 1897." With regard to the finding as to the value of the supposed water right, according to the view we propose to

take of the case, it is but a necessary deduction from the other facts found, and is therefore supported by the evidence upon which they rest.

The principal contentions of appellant's counsel are, that there was no breach of the contract; and that—even if the breach be admitted—there was no right of rescission, and, in fact, no attempt to rescind or offer to reconvey the “water right” before the commencement of the action.

1. With regard to the first point it is contended that the contract was to deliver water only “at all proper and seasonable times for the irrigation of said land,” and that “there is no allegation or finding that a proper and seasonable time has existed.” The point of the contention is that the language of the contract is not to be construed as referring merely to the proper seasons of the year for irrigation, but as requiring also, as a condition precedent to the defendant's obligation to deliver the water, that the land should be “cleared, ploughed, fenced, or in (such) manner improved” as to be ready for irrigation. But clearly the language used refers only to the recurring seasons of the year, and the case is that defendant did not deliver the water at any season of the year.

2. The position of the plaintiff that the failure of one of the parties to a contract to perform does not, in any case, constitute a failure of consideration—and that the only remedy of the injured party is to recover damages—cannot be sustained. In all executory contracts the several obligations of the parties constitute to each, reciprocally, the consideration of the contract; and a failure to perform constitutes a failure of consideration—either partial or total, as the case may be—within the meaning of section 1689 of the Civil Code.

In the case of an executed contract—as, e. g., a deed of land of which the consideration is a promise to pay the purchase money—this is not always true; because in such cases, or generally in such cases, “the vendor has waived actual performance upon the part of the vendee, relying upon his mere promise to perform.” (*Lawrence v. Gayetty*, 78 Cal. 126, 134¹; *Hartman v. Reed*, 50 Cal. 485; *Schultz v. McLean*, 93 Cal. 358.) Which is but to say that, the actual inducement

¹ 12 Am. St. Rep. 29.

to the vendor to enter into the contract, or, in other words, the sole and sufficient consideration contemplated by him, is the mere obligation of the vendee to pay, without regard to the contingency of its performance. For in such cases, almost universally, the payment of the purchase money is secured by a lien on the land sold, and the reliance of the vendor is upon his ability to enforce the payment of the vendee, *in invitum*. But the rule, even if it could be regarded as universal, applies only to the rescission of executed contracts, and not to executory contracts, as in the case here.

3. Nor, where the failure of the consideration is total—which implies, of course, that nothing of value has been received under the contract by the party seeking to rescind—is it necessary that a formal rescission be made before bringing suit. In such cases a suit may always be maintained for the recovery of the consideration paid. (*Santa Clara etc. Fuel Co. v. Tuck*, 53 Cal. 304; *Rose v. Foord*, 96 Cal. 154; *Hayes v. Los Angeles County*, 99 Cal. 79; 1 Chitty on Pleading, *362, note z; *Russ etc. Co. v. Muscupiabe etc. Co.*, 120 Cal. 527.²)

In the authorities cited (except the last, where it is held that a total failure of consideration may be pleaded as a defense to a note without previous rescission) it is held that, where there has been a total failure of consideration as to one party, the law implies a promise on the part of the other to repay and what has been received by him under the contract; and accordingly it was held, in the case first cited, that an attachment was proper.

“Practically (indeed) there is no difference in the effect upon the contract between the successful defense of a plea of a want or total failure of consideration” (or, it may be added, an action to recover back the money paid on a contract of which the consideration has wholly failed), “and the successful termination of an action to rescind it. In either case the contract is rendered incapable of enforcement, the judgment being a bar to any future action.” But nevertheless the legal action to recover the money paid in such a case, as money had

and received to the plaintiff's use, differs, at least historically, from the equitable action to rescind and is too well established to be affected by the authorities, if there be any adverse, bearing on the latter action. The authorities bearing upon the question of diligence in rescinding can, therefore, have no application to this case; nor, indeed were the case regarded as an action for rescission would they apply. Had there been even greater delay on the part of the plaintiff than there has been, it could not be regarded as laches, but rather as an indulgence to the defendant, "and it does not lie in the mouth of the defendant to say that he waited too long." (*Rose v. Foord, supra.*) We are not to be understood, however, as holding that, in cases of total failure of consideration, an action to rescind cannot be maintained without previous rescission. (*Kelley v. Owens*, 120 Cal. 510, 511.)

4. In this case it is found by the court that the water deed of grant was of "no value either to plaintiff or defendant," and that "plaintiff received nothing of value under or by virtue of it." This finding, we are of the opinion, is not only justified by the evidence, but is a necessary deduction from the other facts found. The right conveyed was not a right in the water of Red Rock creek, either in its natural state or as collected or flowing in the proposed reservoir and ditches of the defendant, but simply "a perpetual right to a sufficient amount of water, etc., . . . to be taken from the water system" of the defendant, and to be delivered "in an open ditch" on the plaintiff's land, and to be used thereon exclusively. By the terms of the grant, therefore, the particular water in which a right was granted could be determined specifically only by the ditch, and could have no existence as a definite entity until thus determined. Hence, the deed could not operate as a grant until the ditch—by which alone the subject of the grant could be determined—was constructed, and the subject matter of the grant thus created or brought into being. It was therefore dependent for its character as a grant upon the construction of the ditch and the delivery of the water on the land. Until then, though in form a grant, it transferred no presently existing right, but merely created an obligation to be performed *in futuro*, and which was extinguished by the judgment in the case. And this, indeed,

seems to have been understood by the parties, as is evidenced by the express proviso "that the grant this day made of water to irrigate said land . . . shall be and is subordinate to this agreement"; which can only mean that it was dependent for its vitality upon the defendant's performance of the contract, and was to take effect only upon the happening of that condition.

5. The defense of the statute of limitations cannot be sustained. The action was not barred by section 337 of the Code of Civil Procedure. By the express agreement of the parties, as admitted on the trial, the defendant was not required or expected to bring the water to the land before March 1, 1893; which was less than four years before the commencement of the action. In the contract the time for performance was not specified, and the court below held that it was to be construed as providing for a reasonable time. The oral agreement of the parties was, however, admissible. (Code Civ. Proc., sec. 1856; *Sivers v. Sivers*, 97 Cal. 518.) Subdivision 4 of section 338 has no application. The action is not for relief on the ground of fraud or mistake; nor does section 343 apply. No cause of action arose until within four years before the commencement of the suit.

There remains, therefore, of the provisions pleaded only subdivision 1 of section 339, referring to actions on contracts "not founded upon an instrument in writing." But the action is not for a breach of the original contract, but upon an obligation growing out of the failure to perform it. The plaintiff was not bound to treat the contract as abandoned on the first breach of it, or on any particular breach, but had his election still to rely upon it. The statute could not begin to run until he made his election to rely no longer upon the contract and to sue for the money paid to the defendant under it. (*Ward v. Marshall*, 96 Cal. 155.*)

6. The failure of the plaintiff to allege in his complaint that the water deed or grant was of no value is immaterial. The facts are alleged from which this appears as a necessary conclusion. The finding of the court on this point is a mere

conclusion of law from the other findings; and other findings of the court claimed to be of matters not within the issues may be regarded as immaterial. Nor was there any error in allowing legal interest on the amount recovered. It is so held in *Rose v. Foord*, and other cases cited *supra*.

We therefore advise that the judgment and order denying a new trial be affirmed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

Hearing in Bank denied.

Beatty, C. J., dissented from the order denying a hearing in Bank.

[S. F. No. 2115. Department One.—July 30, 1900.]

CALIFORNIA PASTORAL AND AGRICULTURAL
COMPANY, Respondent, v. J. E. WHITSON, Treas-
urer of Fresno County, Appellant.

SWAMP LAND FUND—PROPERTY OF STATE—DIVISION OF COUNTY—RE-
CLAMATION DISTRICT IN NEW COUNTY—LEGISLATION—RIGHT OF
PAYMENT.—Money paid into the treasury of a county to the credit
of the swamp land fund is the property, not of the county, but of
the state; and where the price of swamp lands in the county had
been paid into that fund, and the county was thereafter divided,
and the reclamation district for those lands was situated wholly
in the new county, which had no part of the swamp land fund,
and reclamation was there effected, new legislation is not required
to warrant payment to the owners of such lands of their proportion
of the swamp land fund of the old county.

1D.—STATUTORY CONSTRUCTION—STATEMENT BY REGISTER—LOCATION OF
DISTRICT—PAYMENTS TO PURCHASERS.—Section 3477 of the Polit-
ical Code, requiring the register of the state land office, upon re-
ceiving proper proofs of the reclamation of swamp lands, to credit
each purchaser in the district with payment in full for such lands,

and to forward "to the treasurer of the county in which any part of the district is situated, a statement showing the amount paid by each purchaser in the district," is to be construed with other provisions requiring the treasurer to divide the balance of the swamp land fund "*pro rata* among the original purchasers of land," and to "pay to each purchaser the amount found to be due," and the reference to the location of the district is not to be considered as standing of the way of the payment to the purchasers as required by law. The statement by the register is properly made to the treasurer of the county in which the lands of the district were situated when the payments for the swamp lands were made, and not to the treasurer of a new county in which the district is situated, which has no part of the swamp land fund.

1D.—REFUSAL OF TREASURER OF OLD COUNTY—MANDAMUS.—Where the treasurer of the old county, after receiving from the register of the state land office the proper statement of payments made into its treasury by purchasers of swamp lands situated in the new county, the reclamation district of which was there located, refused to make any payment to the successor of the owners of the reclaimed lands, *mandamus* will lie to compel him to pay the amount found to be due to such owners out of the moneys in his hands to the credit of the swamp land fund of the county.

APPEAL from a judgment of the Superior Court of Fresno County. J. R. Webb, Judge.

The facts are stated in the opinion.

O. L. Everts, for Appellant.

H. H. McCloskey, and Frank H. Short, for Respondent.

CHIPMAN, C.—*Mandamus*. The plaintiff asks the peremptory writ of the superior court of Fresno county commanding defendant, as treasurer of said county, to pay plaintiff, as the owner of all the lands in reclamation district No. 647, the amounts found to be due it out of the moneys in his hands to the credit of the swamp land fund of said county. Defendant demurred to the complaint for insufficiency of facts. The court overruled the demurrer, and, defendant declining to answer, gave judgment for plaintiff, from which defendant appeals. The following is a brief statement of facts set forth in the petition: Prior to January, 1893, the lands described in plaintiff's complaint were in Fresno county, and were sold by the state to certain purchasers and patents issued

to the purchasers therefor. All the money paid for said lands as the purchase price thereof was paid into the county treasury of said Fresno county, and amounts to the sum of five thousand two hundred and sixty-six dollars and sixty-four cents. The plaintiff herein became, and is, the successor in interest of said purchasers, and is now and ever since the first day of July, 1893, has been the owner in fee of all of said lands. On or about the first day of July, 1893, Madera county was formed out of certain portions of Fresno county, including all of said lands, under an act of the legislature providing for a division of Fresno county and the creation of Madera from part of Fresno county.

About the twenty-sixth day of April, 1895, said lands were formed into a reclamation district and numbered 647, upon petition of plaintiff therefor to the board of supervisors for said Madera county.

On the third day of September, 1895, said plaintiff made satisfactory proof before the board of supervisors of Madera county that it had expended over two dollars per acre in reclamation of said lands; and said board of supervisors of said Madera county duly certified said facts to the register of the state land office, whereupon said register transmitted to the treasurer of Fresno county a statement showing the amount paid by said purchasers upon said lands, including interest. There is no amount chargeable against the land in said district by reason of moneys drawn from the swamp land fund of said county except the sum of thirteen hundred and twenty dollars and ninety-five cents, and there is sufficient money in the said fund with which to pay the amount claimed.

Appellant does not dispute that plaintiff is entitled to the money claimed; his only point is that the provisions of the statute forbid paying it to plaintiff; that the act under which the county of Madera was created makes no provision for the disposition of money in the swamp land fund when the district is wholly in a new county and the money has been paid into the treasury of the old county; that before the register of the land office or the treasurer of a county can disburse such funds upon proceedings had in another county, there must be some act of the legislature to authorize it.

Section 3477 of the Political Code is relied upon. Section 3476 provides that where the works of reclamation are completed, or two dollars per acre has been expended thereon, the board of supervisors shall so certify to the register of the state land office. Section 3477 provides that thereupon the register must credit each purchaser in the district with payment in full for such lands, "and the register must forward to the treasurer of the county in which any part of the district is situated a statement, showing the amount paid by each purchaser in the district," etc. Then follow provisions requiring the county treasurer, after making certain deductions, "to pay to each purchaser, or his assigns, on demand, the amount found to be due him from such computation, out of the moneys in his hands to the credit of the 'swamp land fund' of the county." In the present case the money was paid into the county treasury of Fresno county prior to the formation of Madera county out of territory subsequently taken from Fresno county, and the reclamation was effected after the formation of Madera county, in which latter county all the land is situated, and in which also the reclamation district was formed. The necessary proofs of reclamation were made to the board of supervisors of Madera county and duly certified by that board to the state register, and it appears that there are no claims or demands of the district unpaid, or any indebtedness against said district, except as already stated. The register forwarded the statement of payments made by purchasers to the county treasurer of Fresno county, who originally received the money and who still has the custody of the fund, and not to the county treasurer of Madera county, in which "the district is situated," as the statute directs.

It would have been of no avail to send the statement to the county treasurer of Madera county, for he did not have the fund and never did have it. The statement was made to the actual custodian of the fund, whose duty it now is to pay it over unless the reasons given by him be sufficient excuse for not doing so.

The fund did not belong to Fresno county and was not an asset that county at the time Madera county was created. The fund belonged to the state when paid in, and still belongs to the state, subject to be paid to the purchasers of land as provided by law (*Kings County v. Tulare County*, 119 Cal.

509); and it was also held in that case that the act creating Kings county did not operate to transfer the swamp land fund from Tulare county to Kings county. The same reasons there given apply with equal force here to the effect that the creation of Madera county did not operate to transfer the swamp land fund of Fresno county, arising from lands now a part of Madera county, to the latter county; it is still held by Fresno county as the custodian of the state. The real question is whether some additional legislation is necessary to warrant its payment to plaintiff, conceded to be entitled to it. Appellant cites *Cosner v. Colusa Co.*, 58 Cal. 274. That case throws no light on the question. Certain persons had claims against the reclamation district which had been allowed by the trustees. The statute provided that the money collected for reclamation should be paid out upon the warrants of the trustees, approved by the board of supervisors of the county, and the action was to compel such approval by the board. Appellant also cites *Irwin v. Yuba Co.*, 119 Cal. 686, where a county supervisor sought to recover for extra services rendered the county, and it was said: "It may be safely stated as a rule that one who demands payment of a claim against a county must show some statute authorizing it, or that it arises from some contract, express or implied, which itself finds authority of law."

Conceding this to be a correctly stated rule, may we not apply it here in support of the judgment? The law declares that when the register has certified to the treasurer of the county the amounts standing to the credit of the purchaser of land, the county treasurer "must divide the balance *pro rata* amongst the original purchasers of land . . . and must pay to each purchaser . . . the amount found to be due . . . out of the moneys in his hand to the credit of the 'swamp land fund' of the county." Here are both authority and command. It is true the law directs the statement of the register to be forwarded "to the treasurer of the county in which any part of the district is situated," and this was on the assumption that the district would always be found to be in the county that had the custody of the fund, and did not contemplate the removal of the district into another county after payment by the purchasers. But it will be observed that the law deals with the fund as belonging to

the purchasers who reclaimed the land of the district, and it is to these purchasers the law directs payment to be made. The district and the fund and the claimants are all capable of identification and are fully identified, and the amount due is accurately ascertained; the county of Fresno has no claim upon the fund or right to it; the state is the owner, and has, through its proper officer and in the manner pointed out by law, authorized the payment to the person by law entitled thereto. There is nothing in section 3477 of the Political Code, as we regard it, that stands in the way of payment. The fact that the district has been by law shifted into a different county from that in which it was situated when the money now claimed was paid over to the state cannot reasonably be held to deprive the purchaser of the means of recovering that to which he is entitled or prevent the state from keeping faith with him. The purchaser was as much a beneficiary of the fund after as he was before the district ceased to be a part of Fresno county, and the liability of the state was unchanged.

We advise that the judgment be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Harrison, J., Garoutte, J., Van Dyke, J.

[S. F. No. 1226. Department Two.—July 30, 1900.]

WARREN & MALLEY, Respondent, v. JAY E. RUSSELL
et al., Appellants.

STREET ASSESSMENT—PRIMA FACIE CASE—RECORD UPON APPEAL—AFFIDAVITS.—Where there is nothing in the record upon appeal from a judgment enforcing a street assessment to overcome the *prima facie* case made by the introduction of the assessment, warrant, and accompanying documents, the judgment must be affirmed. Affidavits printed in the transcript which form no part of the record cannot be considered.

- 1D.—FIXING OF GRADE—OUTSIDE CROSSING—CHANGE OF GRADE NOT APPARENT.—The fact that the grade had not been fixed at a crossing outside of the work ordered to be done cannot affect the case; and where it does not appear that the official grade of the work ordered to be done had been fixed prior to the time mentioned in the complaint, no question arises as to a change of grade without a petition of the majority of those owning the land on the street.
- 1D.—PROTEST NOT MADE IN TIME—JURISDICTION.—A protest not asserted within the ten days prescribed by the street law is of no consequence, and gives no jurisdiction to the board of supervisors to act thereupon.
- 1D.—NOTICE OF RESOLUTION BY STREET SUPERINTENDENT—OBSCURITIES—INSUFFICIENT RECORD UPON APPEAL—RESOLUTION NOT IDENTIFIED.—Obscurities in a printed notice of resolution given by the street superintendent are not material if not evidently misleading; and where the resolution of intention involved in the case is not set forth in the record upon appeal, it does not appear that the obscure notice had reference to the resolution of intention under which the work was ordered.
- 1D.—ASSIGNABILITY OF CONTRACT—LIEN OF ASSIGNEE.—The original contractors may assign the contract to others, who may do the work, and the lien follows the completion of the work by the assignee.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. C. B. Hebbard, Judge.

The facts are stated in the opinion of the court.

J. E. Russell, for Appellants.

J. C. Bates, for Respondent.

McFARLAND, J.—Action to enforce a street assessment for grading Greenwich street from Polk to Franklin street. Judgment went for plaintiffs, from which and from an order denying a new trial the defendant appeals.

We see nothing in the record to overcome the *prima facie* case made by respondent by the introduction of the assessment, warrant, and accompanying documents. There are some affidavits printed in the transcript which form no part of the record.

The contention of appellants that the grade had not been fixed at the crossing of Polk and Greenwich streets because

there were a few feet of private land there, even if true, does not affect this case, because that crossing is outside of the work ordered to be done. The work ordered to be done in this case was "between Polk and Franklin streets."

It does not appear that the official grade of Greenwich street between Polk and Franklin had been fixed prior to May, 1894, the time mentioned in the complaint; therefore, there is no question here about a change of grade without a petition of a majority of those owning the land on the street.

The protest asserted by appellants was not within the ten days prescribed by the street law (Stats. 1891, sec. 3, p. 197); therefore it was of no consequence, and gave no jurisdiction in the permises to the board of supervisors.

Appellants object to the sufficiency of a certain notice given by the superintendent of streets that a resolution of intention had been passed by the board of supervisors. The objection is that the figures designating a certain day of April were so obscurely printed that it cannot be determined what they are, and that the last figure of the year is also too faint to be seen. We hardly think that the said obscurities in the printed notice would mislead anyone; but the resolution of intention involved in this case is not set forth in the record, and it does not appear that the said published notice had reference to the resolution of intention under which the work was ordered.

There is nothing in the point that a lien for street work is not assignable. In this case the original contractors assigned the contract to the respondent, who did the work. The street law contemplates the assignment of the contract, and the lien follows the completion of the work by the assignee. We see no other points necessary to be noticed.

The judgment and order appealed from are affirmed.

Temple, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[S. F. No. 1696. In Bank.—July 30, 1900.]

In the Matter of the Estate of AMELIA MARIE KENNEDY, Deceased. JOHN BERGEZ et al., Appellants, v. EDITH A. CHAPPELL et al., Respondents.

PREMATURE APPEAL—DISMISSAL—AFFIRMANCE—STAY OF PROCEEDINGS.

—The dismissal of an appeal as prematurely taken does not operate as an affirmance of the judgment; and, such an appeal being absolutely void, it does not deprive the court below of its jurisdiction, and no stay of proceedings is effected thereunder.

ID.—VALIDITY OF APPEAL BOND—CONSIDERATION.—The validity of an appeal bond given as required by law to make an appeal effectual, the sureties upon which agree to be liable if the appeal is dismissed, is not destroyed by the fact that the appeal is premature, and is not effectually secured. The expense to the respondent in securing a dismissal of the void appeal is a consideration for such undertaking.

ID.—APPEAL FROM DECREE OF DISTRIBUTION—VOID STAY BOND—WANT OF CONSIDERATION.—A decree of distribution of the estate of a deceased person does not fall within the provisions of the Code of Civil Procedure authorizing or requiring stay bonds; and a special stay bond given upon appeal from a decree of distribution is void for want of consideration, arising from the fact that the undertaking does not stay the decree, whether the appeal be premature and void, or valid; and no valid judgment can be rendered against the sureties upon such stay bond.

ID.—PLEA OF WANT OF CONSIDERATION—ESTOPPEL—DISPUTABLE PRESUMPTION.—When want of consideration of a stay bond is pleaded, there can be no estoppel of the sureties that can interfere with that defense. The presumption of consideration attaching to a written instrument is a disputable presumption, which may be overcome by evidence of facts showing a want of consideration.

ID.—ESTATES OF DECEASED PERSONS—DECREE OF DISTRIBUTION—EXECUTION—JURISDICTION OF COURT OVER ADMINISTRATOR.—A decree of distribution of the estate of a deceased person is an adjudication only of the rights of the distributees in regard to the proportions or parts of the estate to which each is entitled, and cannot be executed by any form of process. It is simply evidence of title, and not a judgment that the heir or legatee recover money or other property from the administrator. The administrator is an officer of the court, subject to its jurisdiction until final discharge, and may be compelled by the court to perform his duty. The court discharges him from his trust only when his duty has been fully performed.

1D.—**APPEAL FROM FINAL SETTLEMENT—DISTRIBUTION PENDING APPEAL**
—**NEW DECREE.**—It seems that if, pending an appeal from the final settlement of the accounts of an administrator, a decree of distribution is made, in case the final settlement is reversed or modified, such decree of distribution may be disregarded, and a new distribution made.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco against the sureties upon a bond to stay proceedings. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

M. H. Wascerwitz, John J. Roche, and A. Ruef, for Appellants.

Lucius L. Solomons, and Linforth & Whitaker, for Respondents.

TEMPLE, J.—This appeal is from a judgment rendered against the sureties on an undertaking given to secure a stay of proceedings on appeal to the supreme court, after notice, and in pursuance of a stipulation contained in the undertaking. The appeal is by the sureties.

The undertaking was given on appeal from a decree of final distribution in the above estate dated July 27, 1896. The appeal was taken November 27, 1896, at which time the decree had not been entered, for which reason the appeal was dismissed as prematurely taken. The dismissal, under such circumstances, did not operate as an affirmance of the judgment. (*Brady v. Burke*, 90 Cal. 1; *Home for Inebriates v. Kaplan*, 84 Cal. 486; *Estate of Pearsons*, 119 Cal. 27.) And, moreover, since the appeal was absolutely void it did not deprive the lower court of jurisdiction, and no stay of proceedings was effected. (*Brady v. Burke*, *supra*.)

The fact that an appeal was not secured did not operate to render void the undertaking given as required by law to make the appeal effectual. The sureties on such an undertaking agree to be liable if the appeal be dismissed, and, since the respondent must be at some expense to have even a void appeal disposed of, there is a consideration for the undertaking. This

reasoning has no application whatever to an undertaking required merely to secure a stay of proceedings during an appeal which has already been taken.

The appellants here contend not only that the appeal was an absolute nullity, but that the decree of distribution was also void, and therefore there was no decree to be stayed by an undertaking, and there was an absolute lack of any consideration. The decree of distribution is said to be void because it was made after an appeal had been taken from the decree of final settlement and while that appeal was pending. It is contended that no decree for a final distribution can be made until there is a final settlement of the accounts of the administrator, and that such settlement cannot be said to be final while an appeal is pending from the decree.

There is no doubt some difficulty here, arising from our statute which authorizes a decree of distribution to be made at the same time that the final settlement is made. The administrator might be wrongly charged with the possession of large sums of money belonging to the estate. Such erroneous charges may, in fact, constitute the entire estate to be distributed. Suppose in such a case the administrator takes an appeal from the decree of final settlement, and pending such appeal a decree of distribution is made; if the decree of final settlement is so modified on appeal as to show that the administrator has nothing in his hands whatever, how will he be relieved from the decree of distribution?

If the final settlement were made at the same time, as the code authorizes, the administrator could, probably, have both reviewed on the same appeal, and the distribution could be made to depend on the correctness of the final settlement; but in the case supposed it is difficult to see how, on the appeal from the distribution, the point could be made that the decree of final settlement had been modified, or was erroneous.

Trouble is very likely to arise in such a case, but perhaps the first distribution could be disregarded after the decree of final settlement has been reversed or modified, and a new distribution made. The administrator could not be injured if the decree of final settlement is properly corrected, as it is the function of that decree to determine what property, and

especially what money, belonging to the estate is left in the hands of the administrator after full administration. (Code Civ. Proc., secs. 1637, 1649.) But, although there may be a supplemental settlement of accounts when the decree of distribution is made, the particular purpose and office of that decree is to determine the heirship of claimants and to declare the succession; and the heirs may not, as the creditors may upon a final settlement, issue execution against the administrator for money or other property in his hands. Property may be distributed, though not in the possession of the administrator, and even although adversely held and claimed under title. The decree must simply name the persons and the proportion or parts to which each is entitled, and "such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession." That the decree made ordains that the persons found entitled to the estate shall "have and recover" from the administrator cannot change or enlarge the effect of the decree made under these provisions of the statute. The effect if the decree is declared in the code. It is conclusive "as to the rights of heirs, legatees, or devisees," in regard to the proportions or parts to which each is entitled. It is an adjudication as to rights only, and cannot be executed by any form of process, but may be the basis upon which the person whose rights are determined may demand, sue for, and recover their respective shares from anyone who has possession. It is simply evidence of title, and not a judgment that the heir or legatee recover money or other property from another.

If this be so, then a decree of distribution does not fall within the provisions of the Code of Civil Procedure authorizing or requiring stay bonds. (Code Civ. Proc., secs. 942-945.) It is not a judgment or order directing the payment of money, nor does it direct the assignment or delivery of documents or personal property. It is not converted into such an order, because the administrator cannot get his final discharge without showing that he has paid to the heirs all the money in his hands. The court discharges him from his trust upon proof that it has been fully performed, and payment to the heirs happens to be the last duty in the order of time to be performed.

Respondents cite several cases in this court which they argue determine that the decree is an order for the payment of money. They are all to the effect that when an executor or administrator refuses to pay to the distributee money found to be in his hands, he may be punished for contempt. They are based upon the proposition that the administrator is an officer of the court, and may be so dealt with whenever he refuses to perform a plain duty enjoined upon him as such officer. The same power exists to compel the performance of other duties as well as the duty to pay over money in his hands. A sheriff or receiver may be so punished for not paying over money under certain circumstances, although when demand for it was made there was no judgment or order requiring such payment, and the obligation to pay arose from his office. If the decree is an order or judgment for the payment of money, it can be enforced by execution (Code Civ. Proc., sec. 1007), but the refusal to pay over the money was adjudged to be a contempt, and punished as such partly upon the ground that payment cannot be enforced by execution. (*Ex parte Smith*, 53 Cal. 204.)

All the cases cited are expressly based upon the ground that the court has jurisdiction over the administrator or executor until his final discharge. No special or express order that the administrator pay over to the distributees the money in his hands is authorized or required. Upon the entry of the decree the law fixes upon him the duty to pay over, and the court may compel performance as in the case of any other plain duty resting upon him by virtue of his office.

It must follow that there was no consideration for the undertaking on the part of the sureties, and no recovery can be had against them. It was so expressly held in *Powers v. Chabot*, 93 Cal. 266. (See, also, *People v. Cabannes*, 20 Cal. 525; *Whitney v. Allen*, 21 Cal. 234; *McCallon v. Hibernia Sav. etc. Soc.*, 98 Cal. 442; *Reay v. Butler*, 118 Cal. 113.)

The last case answers the contention of respondents that the sureties are estopped by their undertaking. But upon the view here taken there is no recital of any fact in the undertaking which is material. If there has been a valid decree of distribution that fact would not fix the liability of the sureties. The want of consideration arises from the fact that the

undertaking did not secure a stay of the decree, if there was one. When want of consideration is pleaded there is no estoppel, whatever the terms of the instrument may be, which can interfere with that defense. The idea of such estoppel comes down to us from the days of sealed instruments. Seals were abolished by the code (Civ. Code, sec. 1629), and that there is a good and sufficient consideration for an instrument in writing is expressly made a disputable presumption which may be controverted by other evidence. (Code Civ. Proc., sec. 1963.)

The judgment is reversed.

Harrison, J., Garoutte, J., Van Dyke, J., and Henshaw, J., concurred.

[S. F. No. 1919. Department One.—July 31, 1900.]

JOHN McGEARY, Appellant, v. JOHN SATCHWELL, Respondent.

ACTION FOR BROKER'S COMMISSION—SALE OF REAL ESTATE—WRITTEN CONTRACT ESSENTIAL—ORAL EVIDENCE INADMISSIBLE.—By the terms of subdivision 6 of section 1624 of the Civil Code, an agreement authorizing or employing an agent or broker to sell real estate for a compensation or commission must be in writing. In an action to recover for services rendered by the plaintiff in effecting a sale of the defendant's land, oral evidence to establish the contract is properly excluded.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. James M. Troutt, Judge.

The facts are stated in the opinion.

Robert Ash, for Appellant.

Robert Ferrall, and W. H. Payson, for Original Respondent.

Alex McCulloch, for Executors of Deceased Respondent.

SMITH, C.—Appeal from a judgment for the defendant and an order denying a new trial. The action was brought to recover the sum of three hundred and forty dollars for services rendered by the plaintiff in effecting a sale of defendant's land. On the trial the court refused to hear evidence of the contract on the ground it was not in writing.

The case comes directly under the provisions of section 1624, subdivision 6, of the Civil Code; and similar contracts have uniformly been held invalid by this court. (*McCarthy v. Loupe*, 62 Cal. 300; *Myres v. Surryhne*, 67 Cal. 657; *Zeimer v. Antisell*, 75 Cal. 509; *McPhail v. Buell*, 87 Cal. 115; *Shanklin v. Hall*, 100 Cal. 26.) The case of *Clark v. Allen*, 125 Cal. 276, cited by appellant, has no application. In that case the contract was in writing.

The judgment and order should be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Garoutte, J., Van Dyke, J., Harrison, J.

[L. A. No. 680. Department One.—July 31, 1900.]

UNION SHEET METAL WORKS, Respondent, v. S. C. DODGE et al., Appellants.

MECHANIC'S LIEN LAW—CONSTRUCTION OF SCHOOLHOUSE—BOND OF CONTRACTOR—RECITAL OF CONSIDERATION—GUARANTY TO THIRD PERSONS—ESTOPPEL OF SURETIES.—The validity of a bond given by a contractor for the faithful performance of his contract to build a public schoolhouse, which recites a valuable consideration, and guarantees payment in full of all claims of subcontractors, laborers, and materialmen due to them from the contractor, and states that the bond shall inure to their benefit, does not depend upon the applicability or operation of the mechanic's lien law to a public building. It is sufficient that the bond is not prohibited by law; and persons who bring themselves within the terms of the guaranty may sue the sureties upon the bond, and the sureties are estopped in such action to deny the validity of their undertaking.

- 10.—EVIDENCE—EFFECT OF BOND UPON PARTY FURNISHING MATERIALS AND LABOR—HARMLESS RULING.—The admission of evidence to show what effect the making and giving of the bond had upon the plaintiff in furnishing materials and labor to the contractor is harmless. The plaintiff, as matter of law, had a right to rely upon the bond.
- 10.—QUESTION AS TO NATURE OF BOND—PROVINCE OF WITNESS.—It is not the province of a witness to determine the question whether the bond was a common-law bond or a statutory bond; and it is not error to exclude a question, asked upon cross-examination, as to whether the plaintiff relied upon a statutory bond at the time of entering into the contract.
- 10.—IMMATERIAL FINDING—CONSIDERATION OF LABOR AND MATERIALS—EXECUTION OF BOND—PRESUMPTION.—A finding that the consideration of the furnishing of the labor and materials was the execution of the bond is immaterial, and need not be supported by the evidence. The bond being for the benefit of the plaintiff, the labor and material are presumed to have been furnished in the consideration of the whole contract, including the bond.

APPEAL from a judgment of the Superior Court of Los Angeles County. M. T. Allen, Judge.

The facts are stated in the opinion.

McKinley & Graff, for Appellants.

The mechanic's lien law has no application to public buildings. (*Mayrhofer v. Board of Education*, 89 Cal. 110¹; *Whittaker v. County of Tuolumne*, 96 Cal. 101; *Witter v. Mission School District*, 121 Cal. 350²; *Skelly v. School District*, 103 Cal. 652; *Bouton v. McDonough*, 84 Ill. 396; *Frank v. Chosen Freeholders*, 39 N. J. L. 347.) The legislature has adopted an exclusive provision for the protection of laborers and materialmen in case of public buildings, which was not followed in this case. (Stats. 1897, p. 201.) The bond is not a good common-law bond, having been made to secure a statutory privilege under section 1203 of the Civil Code. (*Powers v. Chabot*, 93 Cal. 269.) This action cannot be maintained under section 1559 of the Civil Code, the provision for the benefit of third parties being merely

¹ 23 Am. St. Rep. 451.

² 66 Am. St. Rep. 33.

incidental to the supposed statutory obligation. (*Buckley v. Gray*, 110 Cal. 346³; *Savings Bank v. Thornton*, 112 Cal. 259; *Biddel v. Brizzolara*, 64 Cal. 354.) A municipal corporation cannot make a contract for the benefit of third persons. (*Breen v. Kelly*, 45 Minn. 352.) The bond is payable to the school district, and plaintiff cannot sue upon it in his name. (*Castele v. Cornwall*, 5 Cal. 426.) The bond contravenes public policy, and cannot be considered a common-law bond. (*Morgan v. Menzies*, 60 Cal. 343; *Benedict v. Bray*, 2 Cal. 254.⁴)

Milton K. Young, and Charles T. Howland, for Respondent.

Though no lien can be taken upon a public building, which cannot be subjected to forced sale, yet it does not follow that other provisions of the statute, not involving a lien, are not inapplicable. (*Bates v. Santa Barbara*, 90 Cal. 543.) The bond, if not expressly provided for in section 1203 of the Civil Code, is good as a common-law bond. (*Williams v. Markland*, 15 Ind. App. 669; *Baker v. Bryan*, 64 Iowa, 561; 21 N. W. Rep. 84; *Knapp v. Swaney*, 56 Mich. 349⁵; *Sample v. Hale*, 34 Neb. 220; 51 N. W. Rep. 837; *Doll v. Crume*, 41 Neb. 655; 59 N. W. Rep. 806; *Kaufmann v. Cooper*, 46 Neb. 644; 65 N. W. Rep. 796; *Fitzgerald v. McClay*, 47 Neb. 816; 66 N. W. Rep. 828; *Lyman v. Lincoln*, 38 Neb. 794; 57 N. W. Rep. 531.) A bond may be given with the intention that it shall be a statutory, and still be good as a common-law, bond, if it violates no statute or public policy. (*Carnegie v. Hulbert*, 70 Fed. Rep. 215; *Morgan v. Menzies*, 60 Cal. 348.) An action will lie in favor of one for whose benefit a common-law contract is made. (*Lawrence v. Fox*, 20 N. Y. 268; *Coster v. Mayor of Albany*, 43 N. Y. 399; *Lyman v. Lincoln*, *supra*; *Baker v. Bartol*, 7 Cal. 551; Civ. Code, sec. 1559; 7 Am. & Eng. Ency. of Law, 2d ed., 106; *Hendrick v. Lindsay*, 93 U. S. 143.)

COOPER, J.—Appeal from judgment on the judgment-roll and a bill of exception. The facts are substantially as follows:

On the 25th of August, 1897, one Lutge entered into a written agreement with the "Long Beach city school district"

³ 52 Am. St. Rep. 88.

⁴ 56 Am. Dec. 332.

⁵ 56 Am. Rep. 397.

in Los Angeles county to furnish material and build a public schoolhouse in the town of Long Beach upon the premises described in said agreement for the sum of eleven thousand two hundred and sixty-nine dollars. It was provided in said agreement that Lutge should, at the time of execution thereof, also execute and deliver to said district an undertaking in the sum of ten thousand dollars, with sufficient sureties for the faithful performance of the contract. The said undertaking was executed and delivered to the said district with the defendants as sureties thereon. It was expressly provided therein as follows:

"We further agree that we will pay all his subcontractors, laborers, and materialmen all the moneys that may become due them by reason of labor or materials under the contract, and we hereby guarantee to them the payment in full of all their claims, and hold ourselves responsible to them in the sum of ten thousand (\$10,000) dollars in legal money of the United States; or as much as may be necessary of the said sum to pay them in full for all labor and materials furnished for said building, whether inclusive or exclusive of the contract price of the same. And this bond shall inure to the benefit of any and all persons who labor for or furnish materials to the said contractor or any person acting for him or by his authority."

On December 7, 1897, Lutge, without having completed the schoolhouse, abandoned the contract, and at the time of such abandonment was indebted to plaintiff in the sum of seven hundred and forty-nine dollars, for labor and material performed upon and used in the construction of the building, which sum has not been paid. This action is brought against defendants on said undertaking to recover the amount due plaintiff. It is not contended that the amount is not due and owing to plaintiff by Lutge, neither is it contended that defendants did not agree that the materialmen and laborers should be paid as provided in the undertaking.

It is claimed by defendants that as the school building to be erected by Lutge was not and could not be subject to any lien by the contractor, or anyone else, that the school district had no authority to demand the undertaking of Lutge, and

that the undertaking was without consideration and void, and that plaintiff is not in privity therewith. It is said that the provisions of section 1203 of the Code of Civil Procedure, as to filing a bond with sureties, relates entirely to contracts required to be filed under the preceding sections, and to contracts by owners whose property is subject to liens, and not to a contract with a school district where no lien could under any circumstances be filed upon the property of the district.

It is further claimed that section 1203, if ever in force as to a contract for the erection of a public building, has been repealed by an act of March 27, 1897, requiring contractors to give bonds to secure the claims of materialmen, mechanics and laborers employed upon state, municipal, or other public work. (Stats. 1897, p. 201.) [It is not claimed by plaintiff that the undertaking was given in pursuance of the act of 1897, and therefore that act need not be discussed.] Neither is it necessary to determine whether or not section 1203 has been repealed as to public buildings by the said act. [The defendants for and on behalf of Lutge, and to enable him to secure the contract, became his sureties. They bound themselves in express terms that all persons furnishing labor or material for said building should be paid. Their contract contained the recital that it was for a valuable consideration. Plaintiff furnished labor and material and brought itself within the terms of the contract made by defendants. The undertaking, if not expressly authorized by statute, was not prohibited. It was not against public policy or good morals, nor in contravention of any statute. To hold the undertaking valid and binding is only to compel the defendants to do the thing they bound themselves to do. To hold the bond void upon a technical construction that it was not a valid statutory bond would be to leave the plaintiff without the security which it had the right to rely upon at the time it furnished the labor and materials. The contention that section 1203 applies only to contracts required to be filed is not supported by any authority, and the section has in effect been construed the other way in *Kiessig v. Allspaugh*, 91 Cal. 234. In that case the contract price exceeded one thousand dollars, and the contract was not recorded as required by section 1183 of the Code of Civil Procedure. It was contended that as the

contract was not recorded it was void, and as the contract was void the bond was equally so and incapable of enforcement. This court held the bond valid and supported by sufficient consideration, and in the opinion it is said: "The bond may therefore, be deemed so far an independent undertaking that the right to enforce it does not depend upon the subsequent or continued validity of the building contract. As already stated, this bond is not within the letter of section 1183 of the Code of Civil Procedure, and, it may be added, that it is not within its reason or spirit, and its enforcement is not in conflict with the policy of that section. We do not think that the appellant, after delivering this bond as an independent security, and thereby inducing the plaintiff to make full payment of the contract price for the construction of the building, is in a position to deny his liability upon it; and if in order to support this action it is necessary that the bond should be based upon a valid building contract, we should hold that the appellant is estopped to dispute the truth of the particular recital contained in the bond as to such fact."

This case was followed and approved in *Kiessig v. Allsbaugh*, 99 Cal. 454, where it was held that, although the contract was void because not recorded, the bond was valid and binding upon the sureties. In the opinion it is said: "But the failure to file this contract with the recorder was not an omission to discharge any duty which the plaintiff owed to the defendant as a surety, and did not add to the obligation imposed upon him by the terms of the bond which he signed. Undoubtedly, the defendant might have stipulated in the bond that the building contract should be filed as a condition precedent to his liability as a surety; but he did not do so, and the court is not authorized to construe or interpolate such a condition into the bond, and in this respect to make a new contract for the parties who executed it."

The fact that a lien could not be filed by plaintiff upon the building was, in contemplation of law, known to the sureties when they signed the undertaking. By the undertaking they bound themselves to pay the obligations that might be incurred by their principal. This obligation having been incurred by the principal, under the contract of guaranty made

by defendants, is binding upon them. They are estopped from claiming that the undertaking was not the particular kind of undertaking required by the codes.]

The late case of *Williams v. Markland*, 15 Ind. App. 669, is directly in point, and supports the views herein expressed. In that case the trustees of a school district in letting a contract for building a schoolhouse, had no statutory authority to require a bond of the contractor, but they did require and take such bond, with defendants as sureties. The bond was conditional for the payment by the principal for all material and labor employed in the construction of the schoolhouse. It was held that the plaintiff could recover of the sureties for material and labor furnished to and used by their principal in the construction of the building. In the opinion the court said: "The taking of such an obligation, under the circumstances under which this was given, is within the scope of the ordinary administrative duties of the trustee, although he may not be by law absolutely required so to do. No special statutory authority is required to make it valid. While the question is a new one in this state, it has been considered in other jurisdictions, and our holding is in harmony with those adjudications. In Iowa the decision is based upon the ground that such a contract is, or may be, for the advantage of the public, by assuring better work and better material more promptly provided by reason of the credit given the contractor by this assurance that laborers and material-men will be thus secured. (*Baker v. Bryan*, 64 Iowa, 561.)"

The same rule has been laid down by the supreme court of Michigan in *Knapp v. Swaney*, 56 Mich. 349^a; and by the supreme court of Nebraska in *Doll v. Crume*, 41 Neb. 655; *Aufmann v. Cooper*, 46 Neb. 644; *Fitzgerald v. McClay*, 47 Neb. 816.

The secretary of the plaintiff while on the stand as a witness was asked by plaintiff's counsel what effect the making and giving the bond had upon his entering into the contract on behalf of the plaintiff. The defendants' objection to the

question was overruled, and the ruling is assigned as error. Conceding the ruling to be error, it is harmless. The plaintiff as a matter of law had a right to rely upon the bond. (*Baker v. Bryan, supra.*) For the same reason it was not error to sustain plaintiff's objection to a question asked of the same witness in cross-examination as to whether he relied upon a statutory bond at the time of entering into the contract. The question as to whether the bond was a common-law bond or a statutory bond was not one which it was the province of the witness to determine.

The tenth finding was to the effect that the labor and material furnished by plaintiff was so furnished in consideration of the execution of the bond, and is challenged as having no support in the evidence. The finding is wholly immaterial and it is not necessary to determine whether or not it is supported by the evidence. If what has been herein said is correct it follows that the bond was for the benefit of plaintiff, and the labor and material are presumed to have been furnished in consideration of the whole contract including the bond.

It follows that the judgment should be affirmed.

Chipman, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

Hearing in Bank denied.

[Sac. No. 630. Department One.—July 31, 1900.]

MANUEL PERERIA, Respondent, v. R. J. WALLACE
et al., Appellants.

MUNICIPAL FRANCHISE FOR ELECTRIC LIGHT AND POWER—MANDAMUS—
Pleading—Demand and Refusal.—In an action of *mandamus* to compel the board of trustees of a town to grant a franchise to the plaintiff to erect and maintain poles and wires along the streets of the town for the purpose of conveying electricity for power and lighting purposes to its inhabitants, where the complaint sets forth a sufficient petition presented to the board for the franchise,

which it alleges was denied, and that the board refused to take further action thereon, the averment of demand and refusal is sufficient.

1D.—SPECIAL DEMAND FOR SPECIFIC ACTS OF DUTY NOT REQUIRED.—The complaint need not allege a special demand upon the board for the performance of specific acts or steps required of them in the granting of the franchise. The refusal to grant the franchise was a refusal to take any of the steps required of them, and no further demand was necessary.

1D.—HEARING UPON VERIFIED PETITION—FAILURE TO ANSWER—PROOF—FINDINGS OF COURT.—In a hearing had upon a verified petition for a writ of mandate, where the defendant has failed to answer, the truth of all the facts alleged is conceded, and they do not need to be otherwise proved; and where the court in such case heard the cause upon the complaint, and made and filed findings in accordance therewith, the judgment entered thereupon is not contrary to law or void, as being a judgment by default.

1D.—PRIVILEGES GRANTED TO RIVAL COMPANY—PLEADING—WAIVER OF OBJECTIONS—FINDINGS—PRESUMPTION OF EVIDENCE—JUDGMENT.—Where the complaint showed that four of the trustees were interested in a rival company engaged in furnishing electricity for light and power, and that at the meeting at which plaintiff's petition was rejected the route of such rival company was approved, though not specifically alleging, as it should, the conditions of its franchise, yet, in the absence of a special demurrer, and of objections to evidence, it must be presumed that a finding, in addition to the facts alleged, that such company did not bid for its franchise, and that it was not sold to it, was sustained by evidence; and a judgment upon the findings awarding a writ of mandate to the trustees to grant the same privileges which were bestowed upon such company, is not objectionable.

1D.—FRANCHISES UNDER CONSTITUTION—CONSTRUCTION—MANDATORY AND PROHIBITORY PROVISIONS—ACT FOR SALE UNCONSTITUTIONAL.—In section 19 of article XI of the constitution, the word "city" is to be construed as including "town"; and the privileges therein granted of using the public streets, and of laying down pipes and conduits therein, under the regulations and conditions provided for in the section, for the purpose of supplying the city and its inhabitants with illuminating light, etc., are mandatory and prohibitory, and exclude the right of the municipality to award such privileges to the highest bidder. The act of 1897 (Stats. 1897, p. 135), providing for the public sale of such franchises, is unconstitutional.

1D.—DUTY OF MUNICIPAL OFFICERS—IMPAARTIALITY OF PRIVILEGES UNDER REGULATIONS—PRIOR GRANT OF FRANCHISE.—It is the duty of the officers of a municipality, subject to the regulations provided for in the constitution, to grant to any applicant a franchise for the use of its streets for poles and wires for the purpose of supplying

the municipality and its inhabitants with electricity for the purposes of light and power. A prior grant of a similar franchise or privilege to other persons or corporations is no reason for not granting it to another.

ID.—GENERAL REGULATIONS FOR DAMAGES AND INDEMNITY—JUDGMENT FOR EQUAL PRIVILEGES—PRESUMPTION—ESTOPPEL OF TRUSTEES.—

Where it does not appear that the town trustees had made any "general regulations for damages and indemnity for damages," such as are referred to in section 19 of article XI of the constitution, but it does appear that they had granted a privilege to another company identical with that sought by and awarded to the plaintiff, the judgment awarding the same privilege necessarily includes whatever regulations are imposed upon that company. It must be presumed that the grant of equal privileges to the two companies does not exceed the powers or duties of the trustees; and the trustees cannot assert the contrary as against the plaintiff.

APPEAL from a judgment of the Superior Court of Siskiyou County. J. S. Beard, Judge.

The facts are stated in the opinion.

Warren & Taylor, for Appellants.

John N. Magoffey, for Respondent.

HAYNES, C.—The defendants are the trustees of the town of Etna, in Siskiyou county. In May, 1898, the plaintiff presented to said trustees a petition for a franchise to erect and maintain poles and wires along the streets of said town for the purpose of conveying electricity for power and lighting purposes to be furnished the inhabitants thereof. Afterward, on July 5, 1898, said trustees denied said petition, and refused to take further action in the premises.

The plaintiff thereupon commenced this action to compel the defendants to grant said franchise. An alternative writ was granted directing the board "to proceed with the provisions of law in relation to the granting of such franchise forthwith, or to show cause," upon a day named, why they have not done so. Defendants demurred to said complaint, and the demurrer was overruled, with leave to answer. No answer having been filed, the matter was heard upon the complaint, and the court made and filed findings, and ordered a writ of mandate to issue requiring the defendants to grant the plaintiff "the same privileges as that granted to the Etna

Development Company"; and from that judgment the defendants appeal upon the judgment-roll.

The complaint set out a copy of the petition presented by the plaintiff to the board of trustees, prior to the commencement of this action, praying that such franchise issue to him, and no point is made by appellants as to its sufficiency. It is alleged in the complaint that said petition was denied, and that the board refused to take further action on it; and appellants contend that the complaint is insufficient, in that it fails to show that any demand was made upon the board for the performance of any specific act which it was their duty to perform; that whatever steps the trustees were required to take upon the petition, or upon its rejection, should have been the basis of a specific demand by the petitioner.

This contention cannot be sustained. If it was the duty of the board to grant the franchise petitioned for, it was their duty to take each and every step required by the law for that purpose without further demand. (*Santa Rosa Lighting Co. v. Woodward*, 119 Cal. 30.)

It certainly was not required of the petitioner, when his petition was wholly denied and rejected, that each particular act which the board might have to perform, if they should grant the franchise, should be specifically demanded. The refusal to grant the franchise was itself a refusal to take any of the steps, and no further demand was necessary to enable the plaintiff to maintain this action.

Appellants further contend that the judgment is contrary to law and void; that the writ cannot be granted by default. (Citing Code Civ. Proc., sec. 1088.)

The complaint was verified, and the failure of the defendants to answer conceded the truth of all the facts alleged. Facts so conceded do not need to be otherwise proved. (Code Civ. Proc., sec. 1094; *Hayward v. Pimental*, 107 Cal. 390.)

It is also claimed by appellant that the writ of mandate granted is not only different from the alternative writ, but "is entirely different, and something he never pretended to have demanded or even asked for, viz., a writ requiring the board of trustees to grant him the same privileges as that granted to the Etna Development Company."

The complaint alleged that the Etna Development Company, a corporation, was interested in furnishing light and power by means of electricity to said town of Etna, that four of said trustees named in the complaint are stockholders or shareholders in said corporation and interested therein, that at the meeting at which plaintiff's petition was rejected the route for the poles and wire of said development company was approved by the board, and upon belief alleged that plaintiff's petition was rejected for the purpose of preventing competition with the business of the development company. Plaintiff further alleged that he had established at great expense an electric light and power plant, and had erected poles and extended wires from his plant to the corporate limits of the town; that large numbers of the citizens of the town requested him to establish such plant, and have agreed to use lights supplied from his plant; and his prayer was for a writ requiring defendants as such board "to proceed with said matter of said application for a franchise according to the laws of the state of California," and for other and further relief.

The court found the foregoing facts as alleged, and also found: "That the said Etna Development Company did not bid for, and the said board of trustees did not grant or sell to said company, a franchise to exercise such right"; and appellant contends that this finding is outside of the pleadings, and not justified by the evidence. We must assume, however, in support of the finding, that there was evidence to support it. There was no motion for a new trial, nor any bill of exceptions or statement showing what evidence was introduced, and upon appeal from the judgment the sufficiency of the evidence to justify the findings cannot be inquired into. It may be conceded that the complaint should have alleged the conditions of the franchise to the development company with greater particularity, but, in the absence of a special demurrer and of any objection to the evidence, appellants cannot complain and were not prejudiced.

Appellants quote largely from the act of 1897 in relation to franchises and privileges of the character here in question, contending that said act (Stats. 1897, p. 135) "contemplates the public sale of any and all privileges hereafter to be grant-

ed to any party." Said act provides that: "Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street railroads upon any public street or highway, to lay gas or water pipes, to erect poles or wires for transmitting electric power or for lighting purposes along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by the board of supervisors, board of trustees, common council, or other governing or legislative body of any city and county, city or town, within this state, except steam railroads, telegraph lines, and renewal of franchises for piers, chutes, and wharves, shall be granted upon the conditions in this act provided, and not otherwise." The act further provides that, when an application is made for a franchise, that fact, with a statement that it is proposed to grant the same, shall be advertised, stating that bids will be received for such franchise, and that it will be awarded to the highest bidder; that the bids must be for a stated per cent of the gross annual receipts arising from the use of the franchise after the expiration of five years from the date of the franchise.

It is contended by respondent that the above statute, so far as it relates to the franchise here in question, is unconstitutional.

Section 19, article XI, of the constitution, provides: "In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages, and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

Section 22 of article I provides that "the provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." The legislature, therefore, cannot modify or change the provisions of said section 19 article XI, above quoted, as to the privilege or franchise of supplying the town of Etna with artificial light. The constitution intended that there should be no restriction upon competition in supplying these prime necessities, as would necessarily result if the privilege could only be granted to the highest bidder, for such bidder would necessarily secure an exclusive right to the exercise of the franchise, the only condition imposed by the constitution being the right of the municipality "to regulate the charges thereof."

It is true said section does not expressly name "towns"; but the original section of the constitution of 1879 used the same language in this regard as the amendment of 1883, and prior to said amendment it was held by this court that the language of said section included cities, towns, and cities and counties. (See *People v. Stephens*, 62 Cal. 209, 236, decided in 1882, prior to the amendment of said section of the constitution, which amendment did not change its language in that regard.) Whether said act of 1897 is valid in so far as it relates to street railroads, or other uses of streets necessarily exclusive in their nature, is not here involved, and no opinion is expressed. We think it clear, however, that under said provision of the constitution the duty of the trustees to grant the franchise demanded by the plaintiff, subject only to the regulations and conditions therein imposed, is imperative, and that a prior grant of a similar franchise or privilege to other persons or corporations is no reason why the plaintiff's demand should not be granted.

It is true it does not expressly appear that the trustees had made any "general regulations" for "damages and indemnity for damages," for the privilege of using the public streets for the purposes specified; but it does appear that a privilege identical with that sought by the plaintiff was granted to the development company, and the writ of mandate granted to the plaintiff is that the same privilege be granted to him as was granted to the development company, and this necessarily includes the regulations imposed upon that company.

That the specific relief prayed for was not in that language is immaterial. The relief granted was the same in substance and effect, and was fully covered by the prayer for general relief. We cannot assume, nor can appellants assert, that the privileges granted to the development company exceeded their powers to grant; and hence it cannot be assumed that the order here granted exceeds either the power or duty of the trustees to grant. No other points are made for reversal.

We advise that the judgment appealed from be affirmed.

Gray, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

[Sac. No. 623. Department One.—July 31, 1900.]

GLENN COUNTY, Respondent v. MARY S. JOHNSTON
et al., Appellants.

ROADS AND HIGHWAYS—CONDEMNATION OF LAND—JURISDICTION OF SUPERVISORS—RES ADJUDICATA.—The jurisdiction of the supervisors to order proceedings by the county to condemn lands for a public road is conclusively established by a final decision upon a writ of review, upon petition of the parties whose lands are condemned, establishing such jurisdiction.

ID.—APPEAL FROM JUDGMENT OF CONDEMNATION—IRREGULARITIES OF SUPERVISORS.—Upon appeal from a judgment in such condemnation proceedings awarding a judgment for the value of the land taken and damages as assessed by the jury, mere irregularities or errors of the board not affecting its jurisdiction do not affect the judgment appealed from, and cannot be considered.

ID.—NONPAYMENT OF JUDGMENT AWARDED—ANNULMENT OF PROCEEDINGS.—Where more than thirty days have elapsed after the final judgment without the payment or deposit in court of the sum of money assessed by the verdict of the jury, in a proceeding brought by the county, upon order of the board of supervisors, to condemn the right of way for a road, the defendant is entitled, under sections 1251 and 1252 of the Code of Civil Procedure, to have the entire proceedings in the superior court vacated and annulled.

Id.—CONSTRUCTION OF CODE—APPLICABILITY TO MUNICIPAL CORPORATIONS—INABILITY TO ENFORCE PAYMENT.—Sections 1251 and 1252 of the Code of Civil Procedure are general in their terms, and apply to all cases. The statute has made no distinction in favor of municipal corporations, but has made the right of the defendants to have the proceedings annulled depend upon the nonpayment of the sum assessed, and the inability of the defendants to enforce payment by execution.

APPEAL from a judgment of the Superior Court of Glenn County and from orders denying a new trial and denying a motion of the defendants to vacate and annul proceedings for condemnation. Frank Moody, Judge.

The facts are stated in the opinion.

Seth Millington, and Charles L. Donohoe, for Appellants.

Ben F. Geis, and R. A. Long, District Attorney, for Respondent.

HAYNES, C.—In July, 1892, proceedings were taken by the board of supervisors of Glenn county to lay out and establish a public road, in part over lands of the defendants, and the viewers awarded to the defendants, as nonconsenting landowners, damages in the sum of one thousand and ten dollars, and an order was made setting aside that sum out of the funds of the proper road district. At the time there was not sufficient money in said fund to pay the same. Afterward, in December, 1892, another order was made setting apart funds for that purpose, but it was not called for or accepted by the defendants. Afterward, the superior court of Glenn county, upon the petition of these defendants, issued a writ of review, and upon the hearing the court found that the board of supervisors had jurisdiction in its proceedings to establish said road, and dismissed the writ; and that judgment was affirmed in this court upon appeal. (See *Johnston v. Board of Supervisors*, 104 Cal. 390, decided October 5, 1894.)

On July 1, 1895, the board of supervisors, by its order, directed the district attorney to commence this proceeding to procure the right of way for said road in accordance with the

report of the viewers, and the proceedings of the board, and upon the hearing it was adjudged that the taking of the land was for public use, and that defendants have judgment for the value of the land taken and damages as assessed by the jury, in the sum of eleven hundred and forty dollars, and judgment was entered March 15, 1898, for said sum, and defendants' costs, fifty-three dollars and ninety cents.

Defendants moved for a new trial upon a statement of the case, and that motion was denied.

On May 2, 1898, defendants moved the court to vacate and set aside said judgment and to dismiss said action upon grounds hereinafter stated, and that motion was also denied, and defendants appeal from the said judgment and from each of the orders denying said motions.

The jurisdiction of the board of supervisors over all the proceedings prior to the commencement of this action is conclusively settled by the judgment upon the writ of review; and mere irregularities or errors not affecting the jurisdiction of the board do not affect the judgment here appealed from. (Pol. Code, sec. 2690; *County of Sonoma, v. Crozier*, 118 Cal. 680.) The supposed errors or want of jurisdiction of the board discussed by appellants need not be further noticed.

On March 15, 1898, the court below made and entered its judgment in said action upon the verdict of the jury. On May 2, 1898, the defendants therein moved said court to annul, vacate, and set aside the entire proceedings of said court had in said action, "and that the entire action and proceedings, and all proceedings on which said action is founded, be dismissed and annulled."

Said motion is based upon the allegations that more than thirty days have elapsed since the entry of said judgment; that no part of the damages or costs so awarded have been paid to defendants or deposited in court; that plaintiff being a municipal corporation, said damages cannot be collected by execution, and that plaintiff has not elected to build the fence, for the erection of which a portion of said sum was allowed by the jury, nor executed a bond therefor under the provisions of section 1251 of the Code of Civil Procedure.

All of said facts were admitted or proved by competent evidence upon the hearing of said motion or petition. The court denied the motion, and defendants excepted and bring up the facts by a bill of exceptions.

Section 2690 of the Political Code provides that if the award of damages made by the viewers and approved by the board of supervisors is not accepted within ten days of the date of the award, it shall be deemed as rejected by the land-owners, and the board of supervisors must by order direct proceedings to procure the right of way to be instituted by the district attorney "under and as provided in title VII, part III, of the Code of Civil Procedure," entitled "Eminent Domain."

Section 1251 of said code, under said title, provides, among other things, that: "That plaintiff must, within thirty days after final judgment pay the sum of money assessed."

Section 1252 of the Code of Civil Procedure provides: "Payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited the defendants may have execution as in civil cases, and, if the money cannot be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendants, if possession has been taken by the plaintiff."

It is contended by respondent that these provisions relate to proceedings by railroad corporations to condemn the right of way, and have no application in this case. It is true that railroads acquire the right of way under the provisions of said title, and that in it are found provisions applicable only to such proceedings by railroad corporations—such, for example, as those in said section 1251 relating to fences and cattle guards; but the provision we have quoted from said section requiring payment within thirty days after "final judgment," and the provisions of section 1252, are general and apply to all cases, and were so treated in *San Diego etc. Co. v. Neale*, 78 Cal. 80, 82, and *Butte County v. Boydston*, 64 Cal. 110. It is also true that after payment of the damages and compensation awarded by the judgment the court is required to make "a final order of condemnation"; but that

is an order after judgment and is not the "final judgment" mentioned in section 1251 of the Code of Civil Procedure. (*California etc. R. R. Co. v. Southern Pac. R. R. Co.*, 67 Cal. 63.) It was not intended that any plaintiff whether a private corporation, or the state, or a county, should prosecute a proceeding in eminent domain to a judgment of condemnation, and fail or refuse altogether, or for an indefinite time, to pay the judgment, and leave the defendants' property charged with a liability to be taken, and such judgment to be paid or not at the option or convenience of the plaintiff. The statute has made no distinction in favor of municipal corporations, but has made the right of the defendants to have the action dismissed to depend upon the fact of their inability to enforce payment by execution.

We think it clear that defendants were entitled to have relief under their said motion, though the extent of that relief is not so clear. The language of the statute is that the court "must set aside and annul the entire proceedings." That this includes all the proceedings had in the superior court is apparent; but whether it includes the prior proceedings upon the petition of the freeholders for the establishment of the road, the report of the viewers and the proceedings of the board of supervisors, all of which is included in defendants' said motion, is a different question.

We do not see how the superior court can vacate or annul such prior proceedings, unless in a direct action for that purpose, which, as already stated, has been resorted to unsuccessfully.

We think the court erred in not granting appellants' said motion so far as the proceedings in the superior court are concerned, and this conclusion renders a further discussion of questions made on the several appeals unnecessary.

We advise that the order denying defendants' motion to annul said judgment and dismiss said proceedings in the superior court be reversed, with directions to grant said motion to the extent above indicated, the costs of said action and of this appeal to be paid by the plaintiff.

Chipman, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the order of the court below refusing to annul said judgment is reversed, with directions to the court below to vacate and annul said proceedings and judgment had in the superior court, the plaintiff to pay the costs thereof and of this appeal.

Harrison, J., Garoutte, J., Van Dyke, J.

[L. A. No. 688. Department One.—July 31, 1900.]

LONG BEACH SCHOOL DISTRICT, Respondent, v.
THEODORE LUTGE et al., Defendants. GEORGE
W. WEIDLER, Receiver, etc., Intervenor and Appel-
lant.

CONTRACT FOR SCHOOLHOUSE—ORDER OF TRUSTEES TO COUNTY SUPERINTENDENT—PROTECTION OF ASSIGNEE FOR VALUE.—Under a contract to build a schoolhouse, where the trustees had issued an order for the payment of installments due the contractor, based upon an estimate properly made by the architect, requiring the county superintendent to draw a warrant therefor upon the proper school fund, and such order was assigned for full value by the contractor, the assignee is not bound by any equities or defenses not existing at the time of the assignment of the order and presentation thereof for a warrant for payment; and he is protected against any equities which might subsequently arise in favor of the school district against the contractor.

ID.—SUBSEQUENT NOTICE OF CLAIMS FOR LABOR AND MATERIALS.—A notice to the school district of claims for materials and labor against the contractor, given subsequently to the assignment and presentation of the order of the trustees, cannot create any liability against the school district, or in any manner increase its contract liability or affect the rights of the assignee.

ID.—SUBSEQUENT BREACH OF CONTRACT—INCREASED EXPENSE.—The subsequent breach of contract by the contractor, though causing increased expense to the school district for the completion of the contract, cannot affect the right of the assignee of the order to require its payment whenever there should be funds applicable thereto.

ID.—BOND OF CONTRACTOR—REMEDY AT LAW—CANCELLATION OF ORDER—INJUNCTION.—Where it appears that the school district exacted a bond of the contractor for the fulfillment of his contract, and that he would pay all claims due to subcontractors, laborers, and materialmen, and that the contract should inure to their benefit, there being an adequate remedy at law upon the bond, the school

district cannot maintain an action in equity against the assignee of the order to cancel the order and enjoin its payment, on account of any increased expense or nonpayment of claims caused by breach of the contract.

APPEAL from a judgment of the Superior Court of Los Angeles County. Waldo M. York, Judge.

The facts are stated in the opinion.

Borden & Carhart, for Appellant.

J. S. Chapman, for Respondent.

W. H. Shinn, for Defendant Lutge.

HAYNES, C.—This action was brought to annul an order issued by the board of trustees of said school district to the county superintendent of schools, requiring him to draw a requisition upon the county auditor to draw a warrant against the high school fund for the amount of nine hundred and twelve dollars and eighteen cents “in favor of Theodore Lutge, or order, on account of and in full of third installment building contract,” and to enjoin the other defendants—the superintendent of schools, the county auditor, and the county treasurer, respectively—from making the requisition, drawing the warrant, or paying the same. Said order, so drawn and delivered by the said trustees to defendant Lutge, was by him assigned and delivered to Charles H. Carey, receiver of the Willamette Steam Mill Lumbering and Manufacturing Company, who filed a complaint in intervention. Weidler, who succeeded Carey as receiver and was substituted for him, appeals from the judgment rendered in favor of the plaintiff canceling said order, and enjoining said officers as prayed by the plaintiff.

The case was heard and submitted upon an agreed statement of facts, which was adopted by the court as its finding, and which, so far as material, is as follows:

On August 25, 1897, plaintiff and Lutge entered into a contract for the erection of a school building by Lutge, the stipulated price being eleven thousand two hundred and sixty-nine dollars, to be paid in monthly installments of seventy-five per cent of the value of the work done, irrespective of materials on the ground and not put in the structure,

and based upon the contract price, the estimate to be made in writing by the architect. Upon an estimate so made the order in question was made on December 6, 1897. Said contract—which is set out in full in the complaint—also required Lutge to execute to the plaintiff a bond in the sum of ten thousand dollars (a copy of which is set out in full in the intervenor's complaint), and which is conditioned for the performance of the contract, to protect the plaintiff against liens, and also that Lutge would pay all his subcontractors, laborers, and materialmen all moneys that may become due to them, and providing that said bond should inure to their benefit.

On December 8, 1897, Lutge, being indebted to the intervenor in the sum of eight hundred and twelve dollars and eighteen cents, upon two promissory notes which were secured by mortgage upon property covered by a prior mortgage, indorsed or assigned said order to Carey, who thereupon surrendered said notes and paid to Lutge one hundred dollars, that being the difference between the amount due on said notes and the amount of said order, and the release of the mortgage was forwarded to Portland, Oregon, to be executed by the intervenor, by Carey's agent, who represented him in this transaction.

On the night of December 8th Lutge was arrested on a criminal charge, and was detained in custody, and was unable to prosecute work on the building, and, after notice to him, the trustees let a contract to another for the completion of the building for the sum of five thousand six hundred and fifty-eight dollars and fifty cents. There had been paid to Lutge, aside from the order here in question, five thousand six hundred and three dollars and eighty-two cents, and notice of several claims for material and labor were, after said order was assigned, presented to the trustees, amounting to four thousand one hundred and ninety-eight dollars and ninety-nine cents.

There was no allegation in the complaint, nor finding by the court, tending to show that the certificate of the architect was improperly issued, or that for any reason the order issued to Lutge was invalid when issued. The order was duly presented to the county superintendent on the day of its transfer

to the intervenor, and the requisition was not then drawn upon the auditor for a warrant, solely for the reason that there was not on that day sufficient funds of the school district then in the treasury to pay the same. It is alleged in the complaint that, if there had been funds in the treasury applicable to that purpose, it would have been the duty of the county superintendent to have drawn the requisition, and of the auditor to issue the warrant, and of the treasurer to pay the same; and it is conceded that at the time the stipulation of the facts was made there were funds in the treasury applicable to the payment of the order sufficient to pay it.

It is contended by respondent that if this order had remained in Lutge's hands that he would not be entitled to payment, because he had not performed his contract; that the amount required to complete the building, with what had been paid to Lutge, lacked only about seven dollars of being the entire contract price.

It is not necessary to consider or decide the question as to Lutge's rights if he had retained the order. The sole question is as to the right of the intervenor, who is conceded to have paid for it by cash and the surrender of Lutge's notes, as above stated.

That this order was assignable is not questioned by the respondent; nor is it questioned that in the absence of some equity then existing, or afterward arising, in favor of the plaintiff against Lutge, the intervenor acquired a legal title to the order, which he could enforce by a judicial proceeding.

Section 1459 of the Civil Code, however, expressly limits the equities to which a non-negotiable instrument is subject, in the hands of the assignee, to those "equities and defenses existing in favor of the maker at the time of the indorsement."

The facts upon which respondent bases its contention that said order is charged, in the hands of the assignee, with an equity in favor of the plaintiff, are that after said assignment Lutge was arrested on a criminal charge and confined in jail; that upon notice to him, and his failure to provide for a continuance of the work, his contract was forfeited, and a contract let to another party for the completion of the building at a price exceeding, when added to the payments made to Lutge, the original contract price by about the amount of the

order here in question, and that materialmen, after Lutge abandoned the work, presented to plaintiff claims to a large amount for materials furnished to Lutge, and which it was claimed were not paid for. No other facts were alleged in the complaint or found by the court tending in any manner to show any equity affecting said order in the hands of the intervenor.

1. The presentation of these claims of materialmen created no liability against the school district which could increase its contract liability.

The contract, as we have seen, required monthly estimates to be made by the architect of the value of the work done, "independently of materials furnished and not then used in the building," and the trustees were to draw a warrant in favor of the contractor for seventy-five per cent of such estimate. The final payment was to include the twenty-five per cent so reserved, to be made upon the architect's certificate of full completion, "and when the contractor shall have presented to the said board evidence that he has paid or otherwise discharged all claims against the building, and the party of the first part [the plaintiff] for all labor done and all materials furnished for the construction of the same." If these materialmen who have, since the abandonment of the contract by Lutge, given notice of their claims, had given such notice before the order was delivered, the plaintiff would have been required to retain the amount thereof, as well as of future estimates, sufficient to pay them (Code Civ. Proc., sec. 1184), and that would have been the extent of plaintiff's liability; and that liability is in no manner increased by the delivery of this order, and its assignment to the intervenor before notice of the claims. This is settled by the case of *Newport etc. Lumber Co. v. Drew*, 125 Cal. 585. In that case the superintendent of construction of a state asylum for the insane was required by the contract to make monthly certificates "showing a full and accurate estimate of the labor performed and material furnished under the contract, with the amount due thereon," viz., ninety per cent of the value of the labor and material. Upon these certificates, when approved by the trustees, the state controller would draw his warrant upon the state treasurer. Two of these cer-

tificates, preceding the final one, were assigned, prior to March 1st, by the contractors to the Farmers' Exchange Bank before they were approved by the trustees, to secure advances made by the bank to the contractor. On March 1st the plaintiff gave notice of its claim for materials, and afterward, on March 18th, the trustees approved the certificates presented by the bank and directed that they be paid to it; and the action was brought to determine whether the plaintiff under its notice, or the bank under the assignment of said certificates, was entitled to the money. It was held that though the effect of the notice of the materialmen to the trustees was to intercept in their hands any money which the contractors were entitled to receive, or which afterward might be payable to them in accordance with the terms of their contract, the estimates having been assigned for value to the bank, and the trustees having been notified of the assignment before the materialmen's notice was served, the bank was entitled to the warrants drawn therefor.

The case at bar is much stronger; for here the trustees had approved the estimate of the architect and had issued and delivered the order or warrant, and it had been assigned by the contractor to the intervenor in satisfaction of a prior debt in part, and as to the remainder, for cash, before notices of the claims were served.

2. That the subsequent breach of the contract by Lutge could not affect the right of the assignee to require the payment of the order, whenever there should be funds applicable to its payment, and that the materialmen who gave notice of their claims after the order was issued to the contractor and assigned to the intervenor, could not hold the plaintiff or the assignee liable for the money represented by it, is conclusively settled by the case above cited, as well as upon principle. It is due to the learned judge who tried this case to say that *Newport etc. Lumber Co. v. Drew*, above cited, had not been decided when this case was heard in the superior court.

Nor does the fact of the contractor's subsequent breach of his contract by failing to complete the building, and the additional expense caused to the plaintiff thereby, create any equity against the assignee of the order, or entitle it to an injunction restraining its payment. The plaintiff provided in

its contract with Lutge against any such contingency by requiring a bond in the sum of ten thousand dollars that he would complete the building, and also that he would pay for all material used and labor employed in construction, and it is conclusively established by the stipulation that the sureties thereon are pecuniarily able to respond to its full amount. The plaintiff, therefore, has an ample and adequate remedy at law, and an injunction to prevent the payment of the order to the intervenor is not necessary to its full protection against loss.

Our conclusion is that the judgment should be reversed, the injunction dissolved, and the action dismissed.

Cooper, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed, the injunction dissolved, and the action dismissed.

Harrison, J., Garoutte, J., Van Dyke, J.

[L. A. No. 676. Department One.—July 31, 1900.]

H. H. DANIELS, Respondent, v. ALFRED K. JOHNSON
et al., Appellants.

ID.—FORECLOSURE OF MORTGAGE—STATUTE OF LIMITATIONS—NEW PROMISE BEFORE BAR OF STATUTE—ASSUMPTION OF MORTGAGE BY VENDEE—ENFORCEMENT IN EQUITY.—The agreement of a vendee of a mortgagor, or of his successor in interest, to assume and pay the mortgage, operates as an agreement to pay the note secured thereby; and where such agreement is made before the note is barred by the statute of limitations, it operates as a new promise continuing the note, and removing it from the operation of the statute as against the promisor, which begins to run as against him only from the date of the promise. Such promise may be enforced in equity by the mortgagee in the action to foreclose the mortgage; and he may treat the vendee as a principal debtor, and take judgment for deficiency against him.

ID.—CONTINUATION OF DEBT AND LIEN—MERGER—RENEWAL—EXTENSION—INAPPLICABLE PROVISION OF CODE.—In such case, there is a mere continuation of the liability upon the note for a longer term, which carries with it a continuation of the lien of the mortgage. There is no merger of the debt in a new contract and no renewal

or extension of the lien, nor any extinguishment thereof; but it it merely continued for the period during which the note, as continued, has to run. Section 2922 of the Civil Code is not applicable, where the statute of limitations has not fully run against the debt before the new promise is made.

APPEAL from a judgment of the Superior Court of San Bernardino County and from an order denying a new trial. John L. Campbell, Judge.

The facts are stated in the opinion.

Otis & Gregg, for Appellants.

E. R. Annable, and Charles E. Truesdell, for Respondent.

CHIPMAN, C.—Foreclosure. On February 23, 1892, one Wilson made his promissory note to plaintiff, payable February 3, 1893, and to secure its payment he executed his mortgage, of even date with the note, to foreclose which this action was brought on June 9, 1897. Defendant Hammond made default, and plaintiff dismissed the action as to defendants Wilson, Howe, and Hogan. Plaintiff had judgment, and defendants Johnson and wife appeal from the judgment and the order denying their motion for a new trial. The only defense is the four year statute of limitations, section 337 of the Code of Civil Procedure. On its face the note was barred, but the complaint averred an express renewal of the note and mortgage and certain acknowledgments of the debt and new promises to pay.

It appeared from the evidence that Wilson, the mortgagor, conveyed the mortgaged premises by deed to defendant Howe on September 28, 1892, containing the following: "This deed is given subject, nevertheless, to one certain mortgage dated February 2, 1892, given by grantor herein to H. H. Daniels, for the sum of seven hundred and fifty dollars, and which said mortgage is of record in book 42 of mortgages, at page 351 thereof, said San Bernardino county records, and which said mortgage the grantee herein assumes and agrees to pay." On January 28, 1893, Howe conveyed the premises by deed to defendant Hogan, the deed containing a provision identical with that just quoted. On December 21, 1895, Ho-

gan conveyed the premises by deed to defendant Alfred Johnson, the deed containing the provision: "Subject, however, to a certain mortgage of seven hundred and fifty dollars dated February 2, 1892, upon which has been paid fifty dollars; the party of the second part hereby assumes the payment of the above mortgage." Appellant contends that the above provisions found in the deeds do not constitute a promise of defendant Johnson to pay the note, but that they amount to nothing more than an agreement on his part to discharge the mortgage lien. It is also contended that a mortgage cannot be renewed or extended except as provided by section 2922 of the Civil Code. The effect of the condition in the deed was more than an agreement to discharge the lien; it was, in our opinion, an agreement to pay the note secured by the mortgage, for in no other way could the mortgage be paid. It was said in *Stuyvesant v. Western Mortgage etc. Co.*, 2 Colo. 28: "While the language of an agreement is that the plaintiff shall pay the mortgage, the real meaning of the covenant is that plaintiff shall pay the note which the mortgage secures, for the discharge of the note is the only way to pay the mortgage, the latter being only the incident, the note being the principal thing."

The effect of the deed from Wilson to Howe, executed as it was while the note was a subsisting obligation, or, in other words, before it was barred by the statute of limitations, was to waive so much of the period of limitations as had run in favor of Wilson, the mortgagor, and established a continuing contract and not a new contract. There was no merger of the old debt in the new, but merely a continuation of the original liability for a longer term. There was no renewal of the lien, and no occasion for its renewal; it was not extended, nor was it extinguished, but continued for the period during which the note, as continued, had to run (*Southern Pac. Co. v. Prosser*, 122 Cal. 413; *Roberts v. Fitzallen*, 120 Cal. 482); and this result differs, as is pointed out in the case just cited, from the result which would follow where the original obligation is renewed after the bar of the statute has occurred, which was the case of *Wells v. Harter*, 56 Cal. 342. The same may be said of the effect of the deed from Howe to Hogan of January 28, 1893, which was within four years from the maturity of

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the note. And so, also, when Hogan conveyed to Johnson, December 21, 1895, more than four years had not elapsed from the maturity of the note.

As between the parties to the deed, *Southern Pac. Co. v. Prosser*, *supra*, is authority for holding that the mortgage lien was not barred, and the only question is whether the agreement of Johnson is available to the mortgagee. It was said in *Tulare County Bank v. Madden*, 109 Cal. 312: "It may be that there is no such privity of contract between the mortgagee and the grantee of the mortgagor resulting from the acceptance of the deed, nor any such promise for the benefit of the mortgagee as would sustain an action at law against him; . . . yet, in equity the creditor is entitled to the benefit of all securities or collateral obligations that his debtor may have acquired for the payment of the debt, and the creditor may, in his action to foreclose the mortgage, treat the mortgagor's grantee, who has assumed payment of the debt, as a principal debtor, and hold him liable for any deficiency for which the mortgagor would be liable on his express promise." (Citing *Williams v. Naftzger*, 103 Cal. 438. See, also, *Hopkins v. Warner*, 109 Cal. 133; *Roberts v. Fitzallen*, *supra*.)

"A purchaser who assumes the mortgage becomes as to the mortgagor the principal debtor, and the mortgagor a surety; but the mortgagee may treat both as principal debtors, and may have a personal decree against both." (Jones on Mortgages, sec. 741.) We entertain no doubt of the right of the mortgagee to look to the grantee in a case such as the present one.

We do not question the proposition that when the debt is barred the remedy under our system is lost. It was so held at an early day by this court (*Lord v. Morris*, 18 Cal. 482), and many times since. But the very question here is, Was not the statute avoided as to the debt as well as to the mortgage by the agreement in the deed referred to? And this question, we think, must be answered in the affirmative.

It was alleged in the complaint, and found by the court to be true as to Hogan, that plaintiff did, at the special request of Howe and Hogan, by an instrument in writing subscribed by the plaintiff and by him delivered to Howe and Hogan, extend said note and mortgage for the period

of one year from February 22, 1893, to wit, until February 2, 1894, and that defendant Johnson did, within four years before the commencement of the action, by an instrument in writing signed by him and delivered to plaintiff, promise to pay said note and mortgage. Appellant objected to the evidence offered to prove a part of these allegations on the ground that it was secondary, the written evidence not having been sufficiently accounted for to entitle plaintiff to make the proof by parol. It is not necessary to examine these objections, nor whether the findings upon this branch of the cases were justified by the evidence. The judgment finds support in the agreements found in the deeds, conceding that the findings as to the other agreements are unsupported. If it was error to admit the evidence in support of these findings, it was not prejudicial.

The judgment and order should be affirmed.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

[S. F. No. 1708. Department One.—July 31, 1900.]

W. D. HALE, as Receiver, etc., Appellant, v. JOHN A. BARKER et al., Respondents.

BUILDING AND LOAN ASSOCIATION—MORTGAGE—ASSIGNMENT OF SHARES—REDEMPTION MONEY—CREDITS UPON MORTGAGE.—Under a mortgage by a member of a building and loan association, where it is part of the contract that when his stock is fully paid up it shall be applied to discharge the mortgage, and the shares are assigned to the association as collateral security for the loan, and the interest and dues are consolidated in the mortgage, the monthly payments are to be regarded as "redemption money," and an implied agreement is raised that they shall be credited upon the mortgage.

ID.—INSOLVENCY OF ASSOCIATION UNPROVIDED FOR—TERMINATION OF CONTRACT—CREDITS UPON MORTGAGE.—Where the building and loan association becomes insolvent, and further performance of the

contract thereby becomes impossible, the contract is to be deemed terminated, and where there is no provision in the mortgage or in the charter or by-laws of the company for the case of insolvency, in an action by a receiver of the insolvent association to foreclose a mortgage against a member whose shares of stock are pledged as collateral security for the loan, the monthly payments of interest and dues, so far as made, should be credited upon the mortgage.

APPEAL from a judgment of the Superior Court of Fresno County. J. R. Webb, Judge.

The facts are stated in the opinion.

L. L. Cory, and Eugene G. Hay, for Appellant.

Upon the insolvency of the association and the appointment of the receiver, the borrowing stockholder is not entitled to be credited upon his loan with the monthly installments upon his stock; but must pay up the mortgage, and afterward stand for a dividend *pro rata* with other members of the association. (*Curtis v. Granite State etc. Assn.*, 69 Conn. 6¹; *Rogers v. Hargo*, 92 Tenn. 35; *State etc. Assn. v. Carroll*, 4 Pa. Dist. Rep. 6; *Cook v. Kent*, 105 Mass. 254; *Strohen v. Franklin etc. Assn.*, 115 Pa. St. 273; *Link v. Germantown Bldg. Assn.*, 89 Pa. St. 15; *Towle v. American etc. Soc.*, 61 Fed. Rep. 446; *Hekelnkaemper v. German Bldg. etc. Assn.*, 22 Kan. 549; *Post v. Building etc. Assn.*, 97 Tenn. 408; *Wohlford v. Citizens' etc. Assn.*, 140 Ind. 662; *Eversmann v. Schmitt*, 53 Ohio St. 174²; *People v. Lowe*, 117 N. Y. 175; *Brown v. Archer*, 62 Mo. App. 277; *Steinberger v. Independent etc. Assn.*, 84 Md. 625; *Hale v. Cairns*, 8 N. Dak. 145³; *Weir v. Granite State etc. Assn.*, 56 N. J. Eq. 234.)

H. H. Welsh, for Respondents.

Many courts have adopted the rule, based upon the theory of the rescission of the contract by reason of the insolvency of the association, and its inability to carry out the contract, that the borrower is chargeable only with the amount received, with interest, and is to be credited with all sums paid in as interest or dues. (*Cook v. Kent*, 105 Mass. 246; *Wind-*

¹ 61 Am. St. Rep. 17.

² 53 Am. St. Rep. 632.

³ 73 Am. St. Rep. 746.

sor v. Bandel, 40 Md. 172; *Low Street Bldg. Assn. v. Zucker*, 48 Md. 448; *Waverly etc. Bldg. Assn. v. Buck*, 64 Md. 338; *City etc. Bldg. Assn. v. Goodrich*, 48 Ga. 445; *St. Peter's Bldg. Assn v. Jaecksch*, 51 Md. 198; *Hampstead Bldg. Assn. v. King*, 58 Md. 279; *Carpenter v. Richardson*, 101 Tenn. 176.) Other rules for equitable distribution are laid down in 7 Thompson on Corporations, 7360, and note, and in *Sullivan v. Stucky*, 86 Fed. Rep. 491; and still another in the authorities cited by appellant. The latter rule is subject to the objection that "hardships and increased expenses of settlement result from the adoption of this rule." (7 Thompson on Corporations, 7360, and note.) The question is undecided in this state.

HAYNES, C.—This action was commenced in the superior court of Fresno county by the American Savings and Loan Association, a corporation having its place of business at Minneapolis, in the state of Minnesota, to foreclose a mortgage executed by John A. Barker and wife upon property situate in Fresno. Prior to the commencement of the action defendant W. H. McKenzie became the owner of the mortgaged property, and, having assumed Barker's liability, he alone answered.

During the pendency of the action the said savings and loan association became insolvent, and W. D. Hale, having been appointed receiver of the insolvent corporation, filed a supplemental complaint, and was substituted as plaintiff. The amount claimed by the plaintiff was seventeen hundred and ninety-two dollars and forty cents, with interest from July 1, 1897, and the court gave judgment in his favor for four hundred and one dollars, and he appeals. The appeal was taken within sixty days upon the judgment-roll, which contains a bill of exceptions. The bill of exceptions admits there was evidence sufficient, in form and effect, to justify all the findings except the fourteenth, but all the facts stated in that finding are repeated and admitted in the bill of exceptions.

The American Savings and Loan Association, the mortgagee, was one of the class of corporations commonly known as building and loan associations, incorporated under the laws of the state of Minnesota, and having its place of business at Minneapolis in said state. Its articles of incorporation provided that the general nature of its business should

be "to assist its members in saving and investing money, and in buying and improving real estate, and in procuring money for other purposes by loaning or advancing under the mutual building society plan, to such of them as may desire to anticipate the ultimate value of their shares, funds accumulated from the monthly contributions of its stockholders, and also such other funds as may from time to time come into its hands."

On June 5, 1889, Barker subscribed for thirty shares, the stock certificate was issued on the 14th, and on the 20th he applied for the advancement of fifteen hundred dollars, by way of loan or anticipation of the value of his shares at their maturity, and, in accordance with the laws of that state and the by-laws of said association, bid the sum of fifty dollars per share, or fifteen hundred dollars, as and for the premium for such advancement.

By the terms of the certificate of stock issued to him, and of the by-laws, Barker was obligated to pay, on or before the 14th of each and every month from and after the date of said certificate, the sum of sixty cents per share as monthly dues upon said stock until the same should be matured and of the value of one hundred dollars per share.

On September 13, 1889, the mortgage was executed. It purported to secure the continued monthly payment of the interest on the advancement of fifteen hundred dollars at the rate of six per cent per annum, and the monthly dues on the stock until it matured, and should be of the value of one hundred dollars per share, and also the surrender of said stock at its maturity in payment of said advancement and the premium bid.

A bond in the sum of three thousand dollars was also executed by Barker and wife containing substantially the same obligations and conditions above stated.

On January 14, 1896, in an action by the state of Minnesota on relation of the attorney general against said association, it was adjudged insolvent and unable to perform its contracts or mature its stock, or to carry out the purposes for which it was created; and the present plaintiff, W. D. Hale, was appointed receiver, and prosecuted this case in the court below.

As a conclusion of law the court found that plaintiff was entitled to judgment for the sum of four hundred and one dollars.

In reaching this conclusion the court charged the defendant with fifteen hundred dollars, the amount of the advancement, and interest thereon, and credited him with the interest paid thereon, amounting to three hundred and ninety-seven dollars and fifty cents, and also credited the monthly payments of eighteen dollars upon the stock, aggregating the sum of one thousand and eight dollars. The only question is whether the defendant is entitled to be credited with the monthly payments made upon his stock, the association having been adjudged insolvent and placed in the hands of a receiver.

Appellant contends that he is not; that he can only be credited with the interest paid; that the monthly payments of sixty cents per share, amounting to eighteen dollars per month, was paid upon the stock and not upon the money borrowed, and that he is entitled to recover said sum of fifteen hundred dollars, with interest from February, 1894, the interest thereon having been paid to that date.

The question here presented has not been adjudicated in this state, but has frequently been considered in other states. The authorities, however, are conflicting, some sustaining the rule adopted by the court, others sustaining appellant's contention, and others still adopting rules varying from each of those contended for here in several particulars.

It is conceded by the authorities generally, as well as by counsel, that where such an association becomes insolvent, and a receiver is appointed, the courts do and should treat the changed conditions of affairs as equivalent to a termination of the contract between it and its members, and that neither the corporation nor its receiver is entitled to enforce subsequently accruing liabilities, either for dues or premiums, and that mortgages given by borrowing members may be foreclosed, though the time for ultimate satisfaction, cancellation and release of the same has not expired. Thus, the mortgagor, who under the terms and conditions of his mortgage, as well as of the charter and by-laws of the corporation, contracted to pay in small monthly payments extending over a period of about seven or eight years, may, at any time after the execution of the mortgage, be required, in consequence of the insolvency of the corporation, to adjust and satisfy the advancement or loan, or suffer his mortgage

[L. A. No. 725. Department One.—August 1, 1900.]

In re LOUIS A. WHIPPLE, in Insolvency. **BAKER IRON WORKS et al.**, Appellants, v. **LOUIS A. WHIPPLE**, Respondent.

INVOLUNTARY INSOLVENCY—JURISDICTION—AMENDED PETITION—INSUFFICIENT VERIFICATION—PAYMENT OF ONE CREDITOR.—The court obtains jurisdiction of proceedings in involuntary insolvency by virtue of the five original petitioning creditors. An amended petition must be verified by three of the creditors who presented the original petition, and a verification thereof by a new creditor not a party to the original petition is insufficient. Where one of the original creditors has been paid, and only four creditors present a second amended petition, the court has no jurisdiction thereof.

APPEAL from an order of the Superior Court of Los Angeles County denying a new trial. **W. H. Clark**, Judge.

The facts are stated in the opinion of the court.

Dillon & Dunning, for Appellants.

J. F. Conroy, for Respondent.

GAROUTTE, J.—Upon January 10th certain creditors of one Whipple filed a petition asking that he be adjudged an insolvent debtor. It was asserted therein that Baily was one of the creditors, and as such creditor he made affidavit to the petition. Thereafter, January 14th, for reasons not apparent in the record, a second petition was filed, and a demurrer to this petition being sustained, an amended petition thereto was filed, and thereupon issue was joined and a trial had. Upon January 12th the claim of Baily was paid. The trial court acted upon the theory that the second and third petitions were amended petitions, or attempted amended petitions, of the first petition, and we will so consider them.

In the first amended petition **W. C. Furrey Company** appears as a creditor, and that petition is verified by their agent, **James W. Hellman**. The **Furrey Company** did not appear as a creditor in the first petition, and, treating the second

petition as an amended petition, we are clear that the Furrey Company was not authorized to verify the same as a creditor. (*Matter of Visalia Water Co.*, 119 Cal. 562; *Anderson v. Superior Court*, 122 Cal. 216.) While we do not hold that an amended petition should be verified by the same creditors who verified the original petition, still the second petition should be verified by three of the original creditors. It is by virtue of the five original petitioning creditors that the court secures jurisdiction of the proceedings, and Furrey was not one of them.

In view of what has already been said, the first amended petition must be deemed in effect a new petition, and this being so, the second amended petition must fall, because at the date of its filing Baily was not a creditor of the alleged insolvent, his claim having previously been satisfied. Without his claim there were but four petitioning creditors to the third petition, the Furrey Company not appearing as a creditor therein.

For these reasons the third petition gave the court no jurisdiction over the alleged insolvent, and the order denying the new trial is affirmed.

Harrison, J., and Van Dyke, J., concurred.

[L. A. No. 730. Department One.—August 2, 1900.]

C. J. PERKINS, Appellant, v. WEST COAST LUMBER COMPANY, Respondent.

ATTORNEY AND CLIENT—ACTION FOR SERVICES—JUDGMENT UPON COUNTERCLAIM FOR NEGLIGENCE—ADVICE NOT TO FILE LIEN—CONSTRUCTION OF FINDING.—In an action by an attorney for services rendered where the defendant recovered judgment upon a counterclaim for damages for negligent advice, upon which issue was joined particularly as to whether the relation of attorney and client existed at the date of the alleged negligence, a finding, not assailed for want of evidence, that on or about that date the defendant sought and obtained of the plaintiff advice as to filing a lien for materials furnished to a contractor, and that plaintiff advised the defendant not to file any lien, for the reason that the contractor was about to file one, should receive such a construction as will uphold the judgment, and, so construed, sufficiently establishes *prima*

in these cases as to the presumptions to be entertained by this court looking toward the support of the judgment, we deem the finding sufficient to attain that end.

We do not see the soundness of the contention to the effect that plaintiff could not be defendant's attorney because at that time he was the attorney of Newman regarding the same subject matter of litigation. We do not see that Newman was a party necessarily adverse to defendant, even if that were material. Newman was the contractor, and defendant was seeking advice upon its rights as to filing a lien upon the building, the property of a third party, and even defendant's knowledge that plaintiff was Newman's attorney at these times does not appear to be material as defeating the creation of the relationship of attorney and client between plaintiff and defendant.

For the foregoing reasons the judgment and order are affirmed.

Harrison, J., and Van Dyke, J., concurred.

[L. A. No. 819. Department Two.—August 2, 1900.]

W. S. TALMADGE et al., Appellants, v. A. C. ST. JOHN
et al., Respondents.

LOCATION OF MINING CLAIMS—LIBERAL CONSTRUCTION OF PROCEEDINGS.

—The proceedings of miners in the location of mining claims are to be regarded with indulgence, and their notices of location are to be liberally construed.

ID.—SUFFICIENCY OF RECORDED NOTICES—REFERENCE TO STATE AND COUNTY—OMISSION.—Where the preliminary notice of location of a mining claim, recorded under the act of 1897, named the county in which the claim was located, and the final certificate of location referred to the posting and record of the preliminary notice, the fact that such certificate omitted to name the state and county of the purported location will not defeat the certificate of location, or the record thereof.

ID.—DESCRIPTION OF CLAIM—BOUNDARIES—REFERENCE TO MONUMENTS—CONSTRUCTION OF STATUTE.—The statute of 1897, requiring that the recorded certificate of location shall contain "a description of the claim, defining the exterior boundaries as marked upon the

ground, and such additional description by reference to some natural object or permanent monument as will identify the claim," is not to be construed as requiring a different reference or identification from that required by the Revised Statutes; and a reference to permanent posts or stone monuments erected on the exterior boundaries is sufficient.

ID.—POSSESSION OF CLAIM BY PRIOR LOCATORS—SUBSEQUENT LOCATION INVALID.—Where the locators of a mining claim under a valid prior location had performed the requisite amount of annual labor thereupon, and were in actual possession of the claim, having a tent thereupon with their bedding and tools in charge of an employee holding possession for them, and their monuments marked upon the ground were plainly visible at the time of entry made by other locators, who made a location upon an alleged discovery of ore taken from the place where the prior locators had been working, such subsequent location can have no validity, though all the statutory requirements of location were complied with by the subsequent locators.

APPEAL from an order of the Superior Court of San Bernardino County granting a new trial. Frank F. Oster, Judge.

The facts are stated in the opinion of the court.

Charles L. Allison, Rolfe & Rolfe, and C. C. Haskell, for Appellants.

The certificate of plaintiffs' location is void, as not complying with the requirements of the act of 1897, in not referring to some additional monument besides the exterior boundaries, in order to identify the claim. (Stats. 1897, sec. 3, p. 215.) The object of the recording act is that the claim may be identified from the description contained in the record. The act must not be interpreted so as to defeat its purpose, by allowing any one of five hundred claims to cover the ground in question. (*Brown v. Levan* (Idaho), 46 Pac. Rep. 661; *Mace v. Gaddis*, 3 Wash. Ter. 125; *Brady v. Husby*, 21 Nev. 453; *Faxon v. Bernard*, 9 Morr. Min. Rep. 515; *Darger v. Le Sieur*, 8 Utah, 160; *McEvoy v. Hyman*, 15 Morr. Min. Rep. 397; *Drummond v. Long*, 9 Colo. 538; *Flavin v. Mattingly*, 8 Mont. 242; *Hammer v. Garfield Min. Co.*, 130 U. S. 290.) There can be no valid possession of a mining claim without a valid location. (*Du Prat v. James*, 65 Cal. 555; *Lockhart v. Wills*, 9 N. Mex. 344; *Horswell v. Ruiz*, 67 Cal. 111; *Belk v. Meagher*, 104 U. S. 284; 1 Morr. Min. Rep. 510, 515.)

Goodrich & McCutchen, and Harris & Garrett, for Respondents.

The certificate of location is to be liberally construed, and the acts of miners in making locations are construed with great liberality. (*Carter v. Bacigalupi*, 83 Cal. 192, 193; *Mt. Diablo Min. etc. Co. v. Callison*, 5 Saw. 447-50; *Bramlett v. Flick*, 23 Mont. 95; *Erhardt v. Boaro*, 113 U. S. 537; *Book v. Justice Min. Co.*, 58 Fed. Rep. 115.) Reference may be made to any permanent post or monument on the ground. (*North Noonday Min. Co. v. Orient Min. Co.*, 6 Saw. 299; 1 Fed. Rep. 522; *Bramlett v. Flick*, *supra*; *Credo Min. etc. Co. v. Highland Min. etc. Co.*, 95 Fed. Rep. 911; *Hanson v. Fletcher*, 10 Utah, 266; *Hammer v. Garfield Min. Co.*, 130 U. S. 291.) Plaintiffs had sufficient notice of defendants' possession. (*Donahue v. Meister*, 88 Cal. 130, 131¹; *Newbill v. Whitfield*, 63 Cal. 85; *Doe v. Waterloo Min. Co.*, 55 Fed. Rep. 11; 70 Fed. Rep. 455.)

HENSHAW, J.—This is an appeal by plaintiffs from an order of the court granting defendants' motion for a new trial. The action was instituted by plaintiffs to recover possession of certain mineral land, for an injunction restraining defendant from extracting ores, and for damages. The following facts were disclosed without conflict in the evidence: On the tenth day of October, 1898, the defendant St. John and others, prospecting for precious metals upon the public domain of the United States, discovered gold bearing rock in place, and, with the purpose of appropriating the same, erected at the point of discovery a prominent and substantial stone monument more than three feet high and more than two feet in diameter at the base, and posted their preliminary location notice claiming fifteen hundred feet in an easterly direction along the course of the lead, and three hundred feet on each side, naming the claim the "Blue and the Gold Mine." In their preliminary notice they gave the date of discovery, the date of the location, and the county in which the claim was located. This notice was properly signed, and on the twenty-sixth day of October, 1898, was recorded in the office of the county recorder of San Bernardino county. About two weeks later they constructed

¹ 22 Am. St. Rep. 283.

monuments upon the boundaries of the claim, building a monument at each corner and at the center of each end line, placing notices in each monument stating what corner of the claim it marked. The monuments were substantially built of stone and were generally of the size of the one above given. In the discovery monument first constructed they placed their second notice, designated "Certificate of location—quartz claim. Second or completed notice." This last notice gave the name of the claim, the names of the locators, the date of the discovery, and the fact that the notice was posted on the claim on the tenth day of October, 1898, as provided in section 2 of an act of the legislature of the state of California, entitled "An act prescribing the manner of locating claims upon the public domain of the United States, recording notices of location thereof, amending defective locations," etc. (Stats. 1897, p. 215.) This notice was sworn to by defendant A. C. St. John on the twenty-ninth day of November, 1898, and recorded on the same day in the records of San Bernardino county. The locators began their work on the claim on the twenty-seventh day of October, 1898, and worked from that time on continuously until the twenty-first day of January, 1899, when work ceased under an injunction issued by the superior court of San Bernardino county at the instance of these plaintiffs. On November 18, 1898, they had moved on to the claim and were living in a tent near their discovery monument. The value of the work performed by them prior to the issuance of the injunction was about two hundred and fifty dollars. On the twenty-seventh day of December, 1898, the locators were absent, having gone to Los Angeles to spend the holidays with their families. Their tools, tents, and bedding, however, still remained on the claim, and they left one A. H. Jennings, an employee, in charge of it. On that day the plaintiff, W. S. Talmadge, and O. M. Potts went upon the ground and made an asserted discovery of ore in place at the point where the defendants had been at work. They constructed a substantial monument on the dump made of ore which had been extracted by the defendants. They placed in it a preliminary location notice, which was recorded on the thirtieth day of December, 1898, in the records of San Bernardino county. At the time they built

their monument and posted their notice plaintiffs had heard the defendants had done work at the dump upon which their monument was constructed. They saw the tent, and on the morning of the following day they saw Jennings at the tent. They did not look for any monument on the 27th, but on the following day found the east and west end monuments of defendants' claim. Jennings tore down the notice put up by Talmadge on the 27th, and Talmadge replaced it on the morning of the 28th. At the time of their entry Talmadge was armed with a rifle and Potts apparently was carrying a pistol. Between the sixth and thirteenth days of January the plaintiffs did fifty dollars' worth of work within the boundaries of the ground claimed by them, which is substantially the ground covered by defendants' location. They named their claim the Cardinal. When they went upon the ground to do their work, St. John, Williams, and Jennings were there and told plaintiffs that they objected to work being done, and stated that they claimed the ground. On the 13th of January Talmadge posted another preliminary notice at the same place where he had posted the notice on the 27th of December, and built a new monument because the earlier monument had been destroyed. At the same time he posted his final notice of location, which notice, sworn to by him, was duly recorded in the records of San Bernardino county. At the time of posting the final notice of location the defendants had constructed monuments upon the Cardinal claim sufficient to define its boundaries so that they could be readily traced.

Defendants moved for a new trial on the ground of the insufficiency of the evidence to justify the decision, that the decision was against law, and for errors of law occurring at the trial. Upon this appeal it appears that defendants were the prior locators, and that the notices of plaintiffs, who were subsequent locators, are unimpeachable in form. Plaintiffs' rights, then, depend primarily upon the question of the sufficiency or insufficiency of the prior notices filed and recorded by defendants, for, if defendants' notices sufficiently comply with the law, their possessory right to the land in question against these plaintiffs may not be disputed. In rendering judgment the trial court seems to have been of opinion that these notices were legally insufficient. A modi-

lication of its views in this regard led to the granting of a new trial, as appears from the fact that this question, and this question alone, is here argued by the parties.

By section 2324 of the Revised Statutes of the United States all records of mining claims hereafter made are required to contain the names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. By section 3 of the act of the legislature of this state, approved March 27, 1897 (Stats. 1897, p. 15), it is required that the certificate to be recorded shall state: "4. A description of the claim defining the exterior boundaries as they are marked upon the ground, and such additional description by reference to some natural object or permanent monument as will identify the claim." It is urged that the notice recorded by defendants failed in two essential particulars to comply with these laws, and is therefore void. First, that it fails to mention either the state or county of the purported location. The final notice of defendants, as recorded, is irregular in this particular, but herein does not differ from the notice considered by this court in *Carter v. Bacigalupi*, 83 Cal. 187, where it is said: "The notion that, where the part of the vein or lode which is claimed is sufficiently described in the recorded notice, the phrase 'this vein or lode' is not sufficient unless accompanied with the information that the vein or lode in question is within a particular district, county, or state, is one that might arise in the mind of a lawyer, but would not be apt to occur to a miner. . . . In construing notices like this it must be remembered that, as a rule, miners are unacquainted with legal forms and requirements, and are frequently out of the reach of assistance; and in view of this, it has been wisely held that their proceedings are to be regarded with indulgence, and liberally construed. In this case we think that the notice was sufficient, both as posted and recorded." Moreover, the final notice in this case makes reference to the preliminary notice posted as required by law and recorded in the records of San Bernardino county, and this preliminary notice named the county in which the claim was located.

The second contention against the validity of defendants'

notice is that the description is inadequate, and that the law requires that the notice shall contain not only a description of the exterior boundaries, as marked upon the ground, but also such a description as will, in addition, identify the claim by reference to some natural objects or permanent monument. The description in question locates the claim as "commencing at a monument at the center of the west end line, thence running northerly 300 feet to a stone monument at the N. W. corner, thence 1500 feet easterly to a stone monument, being the N. E. corner, thence southerly 300 feet to a stone monument, being the center of the east end line, thence southerly 300 feet to a stone monument, being the S. E. corner, thence westerly 1500 feet to a stone monument, being the S. W. corner, thence northerly 300 feet to the point of beginning." As is said in *Mt. Diablo Min. Co. v. Callison*, 5 Saw. 439: "The object of any notice at all being to guide a subsequent locator and afford him information as to the extent of the claim of the prior locator, whatever does this fairly and reasonably should be held in good notice. Great injustice would follow if years after a miner had located a claim and taken possession and worked upon it in good faith his notice of location were to be subjected to any very nice criticism." In this notice the exterior boundaries are described and the corners of the claim fixed by reference to permanent stone monuments. We do not think that, in the particular matter under consideration, the statute of this state requires more than is exacted by the Revised Statutes of the United States. Both laws demand a description by reference to some natural object or permanent monument such as will identify the claim. Touching this requirement Judge Sawyer, in the North Noonday case (6 Saw. 299), says: "The natural objects or permanent objects here referred to are not required to be on the ground located, although they may be, and the natural object may consist of any fixed natural object, and such permanent monument may consist of a permanent post or stake firmly planted in the ground, or in a shaft sunk in the ground." The stone monuments referred to in this notice were certainly within the interpretation of the statute thus given and universally followed.

Moreover, when the plaintiffs went upon this mining

ground they were confronted with ample evidence touching its occupancy and prior location. The tent, bedding, and tools of the defendants were there; Jennings, an employee, was holding possession for them; the monuments erected by defendants could have been seen, should have been seen, and, in fact, were seen. As was said by this court under a similar state of facts in *Newbill v. Whitfield*, 63 Cal. 81: "At all events, when the defendants went on the ground on the sixteenth and seventeenth days of July, 1881, they found, or could have found if they had looked, the monuments—eight in number—erected by Wallace, Parks, and Ferrell on the 12th of April, with the notices above indicated. Those boundaries included the premises in controversy. From them the defendants saw, or ought to have seen, that the ground was appropriated by others, and was not open to location by them."

The order appealed from is therefore affirmed.

Temple, J., and McFarland, J., concurred.

[S. F. No. 1577. In Bank.—August 3, 1900.]

**FRESNO CANAL AND IRRIGATION COMPANY, Re-
spondent, v. ADELINE B. PARK et al., Appellants.**

IRRIGATION OF LANDS—LIEN OF WATER COMPANY FOR ANNUAL RATES—CONSTRUCTION OF CONTRACT—COVENANTS BINDING REPRESENTATIVES.—In the absence of any law regulating water rates, a water company engaged in the irrigation of lands in a farming district may enforce a lien upon the lands to which water is supplied, as against a subsequent purchaser thereof, for nonpayment of the annual rates fixed by the contract with the original owner, when the contract makes the water supplied thereunder an appurtenance to the land upon which it is to be used, and contains a covenant binding the owner of the land, his heirs and assigns and successor in interest, to pay a fixed sum per year to the water company, although technically such covenant does not run with the land.

ID.—PUBLIC USE—REGULATION OF WATER RATE—FRANCHISE—CONSTITUTIONAL LAW—CONSTRUCTION OF CONSTITUTION.—The provisions of the state constitution making the use of all water appropriated

for sale, rental, or distribution, a public use, and subject to the regulation and control of the state in the manner to be prescribed by law, and declaring that the right to collect rates or compensation for the use of water in any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law, are not to be construed as taking away the right under the general law of the land to collect rates or compensation fixed by contract of the parties for the irrigation of lands, in the absence of a special statute, or authorized provision, regulating such rates.

1D.—CONSTRUCTION OF ACT OF 1885—POWER OF SUPERVISORS—MAXIMUM RATES—RIGHT OF CONTRACT.—The act of March 12, 1885 (Stats. 1885, p. 95), does not destroy the right of contract between irrigation companies and the owners of land. It merely allows the supervisors upon proper petition to fix maximum rates, and the power of contract within such maximum rates is still preserved, and until the supervisors shall have acted, persons selling water are allowed to continue to collect their established and customary rates, without being required to make a formal declaration or to secure an ordinance to that effect.

APPEAL from a judgment of the Superior Court of Fresno County. J. R. Webb, Judge.

The facts are stated in the opinion of the court.

M. K. Harris, and H. C. Campbell, for Appellants.

William J. Hunsaker, *Amicus Curiae*, also for Appellants.

John Garber and Frank H. Short, for Respondent.

W. B. Treadwell, and A. Haines, *Amici Curiae*, also for Respondent.

Words & Works, Independent *Amici Curiae*.

McFARLAND, J.—This is an action to enforce a lien against certain land of the defendants Adeline B. Park and her husband, William Park, alleged to have been created by a certain instrument in writing made by and between plaintiff and one Perrin, who was said defendants' predecessor in interest in the land. The other defendants are made parties as claiming some interest in the premises. Defendants demurred to the complaint, and their demurrer was overruled. They declined to answer and judgment was rendered for

plaintiff, and they appeal from the judgment. It is admitted by appellants that all special causes of demurrer were obviated by a stipulated amendment to the complaint; so that the only ground of demurrer to be considered is the general one that the complaint does not state facts sufficient to constitute a cause of action.

These facts appear from the averments of the complaint: The respondent is a corporation organized in February, 1871, for the purpose of straightening, improving, etc., the natural channel of Kings river and its branches, and taking water therefrom by means of canals and ditches for various beneficial uses, and, among others, for the disposition of the waters and "collecting annual rents and charges therefor." On March 28, 1892, respondent and one E. B. Perrin executed a written instrument, which was duly acknowledged by the parties and was recorded on the 31st of the same month. Plaintiff's canals and ditches run through an agricultural region, and do not furnish water within any city, town, or municipality. The covenants of this instrument necessary to be mentioned here are as follows: The respondent, in consideration of a certain sum of money then paid it by Perrin, covenanted to furnish to the latter from its main canal, or from a branch thereof, all the water that may be required for the irrigation of a described piece of land then owned by him, for a certain number of years commencing May 28, 1892, "not exceeding at any time one cubic foot per second." The respondent agreed to put a suitable gate in the bank of the canal at the most convenient point for the conveyance of water to Perrin's land; and Perrin agreed to construct a ditch from the gate to his land at his own cost, etc. Perrin agreed that he would not use the water, or permit it to be used, on any land other than that described in the instrument, and would not permit it to run to waste, and would provide means to carry any surplus water back to the respondent's canal. It was declared that the water to be thus furnished was intended to be an appurtenance to and to run with the land, that the right thereto was to be transferable only with the land, and that respondent was to be bound by the instrument only to subsequent owners of the land. Perrin covenanted for himself, his heirs, assigns, and successors in interest, for the payment annually to respondent of the sum of one hundred dollars on the first day of Septem-

ber of each of the years mentioned. It was agreed, also, that respondent might make a certain number of similar contracts with other persons, and that if at any time the aggregate quantity of water should be insufficient to supply all the contractors, Perrin, and each of the others, should receive his proportionate share. It was declared that the covenants of Perrin should run with and "bind the land." The foregoing are, we think, all the covenants of the instrument which need at present be mentioned.

It is averred that prior to September 1, 1897, Perrin conveyed a certain described part of the land to the appellants Adeline and William Park, who since then have been and are the owners in fee and in possession of the same. It is further averred that ever since the execution of said instrument the respondent "duly performed each and all of the covenants and agreements therein contained on its part to be performed"; and it is averred that there is due and unpaid upon said contract, and chargeable upon the said land conveyed to appellants as aforesaid, certain amounts due for several of the years, aggregating one hundred and fifty dollars and interest.

We are not embarrassed with the question whether or not the instrument upon which the action is founded creates a lien on the land in the hands of the appellant. In their opening brief counsel for appellants say: "It is admitted for the purposes of this argument that, if valid, this contract runs with and binds the land in the hands of appellants to the same extent that it would in the hands of the said E. B. Perrin." Moreover, it was expressly held in *Fresno etc. Irr. Co. v. Rowell*, 80 Cal. 114,¹ and in *Fresno etc. Irr. Co. v. Dunbar*, 80 Cal. 530, that an instrument exactly like the one in question here—and to which the present respondent was a party—did create a lien enforceable against the land in the hands of a subsequent owner, although technically it did not "run with the land." But appellants contend that the contract is, in all its parts, utterly void, and therefore without any legal effect even as between the original parties.

The theory that a contract like the one in question here cannot be legally made is of recent origin. Until within the

¹ 13 Am. St. Rep. 112.

last few years no one would have thought of doubting that the owner of a water ditch could supply water to a customer for mining or irrigation purposes on such terms as the two might agree upon. It is now said that such a contract is forbidden by the present state constitution which was adopted in 1879. But the two cases above cited from 80 California—in which the present respondent was plaintiff and in which contracts like the one here in question, made by respondent with other parties, were upheld—were decided in 1889; and the case of *Balfour v. Fresno etc. Irr. Co.*, 109 Cal. 221, where a similar contract (made also by respondent) was upheld, was decided as late as September 27, 1895. To the same effect are *San Diego Flume Co. v. Chase*, 87 Cal. 561, *Clyne v. Water Co.*, 100 Cal. 310, *Merrill v. Irrigation Co.*, 112 Cal. 426, decided in 1896, and *Fairbanks v. Rollins*, 54 Pac. Rep. 79, decided August 4, 1898. It is contended, however, that those cases should not be considered of any value as authorities here because in all of the said cases the court had entirely overlooked or forgotten prominent provisions of the constitution now called to our attention, and the learned counsel of the parties opposed to the present respondent in those cases failed, through dimness of mental vision, to see and call attention to the conspicuous wall of the constitution behind which, according to appellants' contention, they could have safely put their client. It would be remarkable, indeed, if during the consideration of all these various cases, and down to 1898, the thought never suggested itself to either court or counsel that the novel and notable provisions of the constitution about water, now relied on, could be invoked as defenses to those actions; but, as such a thing is barely possible, we will give the question an independent investigation.

The parts of the constitution relied on by appellants are sections 1 and 2 of article XIV. The first clause of section 1 is as follows: "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner to be prescribed by law." The rest of the section applies exclusively to cases where water is supplied to incorporated cities or towns, or to that other kind of municipality known as a consolidated

"city and county," so that the parts of the section other than the first clause need not here be considered—except so far as they throw light upon the meaning of section 2 and upon certain statutory law. Now, there is nothing in the said first clause of section 1 above quoted which, in itself, at all affects the validity of the contract in question in the case at bar. The clause merely declares that the use of water appropriated for distribution, etc., is a public use, and that the state may by law regulate it.

Section 2, which is mainly relied on, is as follows: "The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law." Appellants seem to lay great stress on the fact that the word "franchise" is used in this section, as if "franchise" were a negative word signifying prohibition, instead of being, as it is, an affirmative word denoting a grant. Whatever right a ditch owner had to sell and distribute water at the time the constitution was adopted, or afterward, was not destroyed because it was called in the constitution a franchise. The real meaning of "franchise" is a privilege granted—not a right taken away; but the word was evidently employed in section 2 mainly for the purpose of emphasizing the general declaration in section 1 that the use of water for sale, distribution, etc., is a public use, and with the notion, no doubt, that calling it a franchise would make more clear and certain the intent to subject it to state regulation. In all other respects the meaning and effectiveness of section 2 would be the same if the words "is a franchise, and" were not there.

But the serious questions arising out of section 2 are as to the meaning of the words "cannot be exercised except by authority of and in the manner prescribed by law." This is the language upon which the contention of appellants is ultimately based, and which is to be seen prominently reiterated through the pages of their briefs. The contention really is, although somewhat thinly veiled, that respondent could not collect any rentals, or make any valid contract about the same, unless the legislature had passed a law—a "statute law," as they say—expressly giving the power and prescribing the

manner in which it should be exercised, and that the demurrer should have been sustained because such statute was not set up in the complaint. This contention rests on the proposition that when the constitution was adopted in 1879 it immediately prohibited the owner of a water ditch from selling any water or making any contract about furnishing water, or collecting any rentals therefor, until the legislature should enact a statute expressly conferring power to do these things; and, further, that the constitution gave the legislature power, by inaction, to utterly destroy all property in ditches and water rights used for the distribution and sale of water. This proposition cannot be maintained; and we do not think that any authority cited by appellants goes to the extent of clearly and frankly declaring that to be the law, after a careful consideration of its full significance.

All the provisions of the constitution on the subject must be considered together, and in the light of the evils sought to be remedied and the condition of the property in ditches and the use of water at the time the constitution was adopted. The appropriation, diversion, distribution, and sale of water have been a prominent business in California since its first settlement by Americans. During its early American history its leading industry was mining, and the diversion of water from rivers and small streams to the localities where the mines were discovered was an absolute necessity to the business of mining. Consequently, immense sums of money were invested in water rights, and in ditches which were constructed at great expense in nearly every part of the mining regions. At later periods still larger ditches were constructed through regions devoted to agriculture, and water furnished, for compensation, for irrigation. In many parts of the state these ditches were as essential to farmers as those in the mountains were to miners. The amount of compensation to be paid for the water furnished was determined by the private contracts of the parties. Property and ownership in these ditches, and in the use of the water flowing therein for sale and distribution, in which millions of money have been invested, were as deeply founded and as thoroughly established in the law as property in any other thing capable of ownership. Such was the situation when the constitutional convention met in 1878. It is possible that the convention intended to practically destroy, or confiscate, all this immense

property, or to allow the legislature to do it? It could not have accomplished this result within the principles of the federal constitution, and it is not to be held that it intended to do so unless the language of the constitution which it constructed leaves no doubt on the subject. According to the proposition upon which appellants' contention rests, the owners of water ditches intended for the distribution and sale of water were stripped of all beneficial attributes of ownership therein from the adoption of the constitution until such time as the legislature might see fit, by statute, to confer upon them the privilege of enjoying their own property. Numerous consumers might be anxious to obtain water at prices readily agreed upon, but no contracts about it could be made. Would the water have to run to waste unless those desiring it took it forcibly without compensation? No such state of affairs was contemplated by the convention, nor intended by the language of the constitution.

It was no doubt contemplated that the main evil to be remedied existed in cities and towns, where it was feared that a corporation having practically the monopoly of furnishing water therein, would, by exorbitant charges, oppress the large number of small buyers who are compelled to have water constantly for domestic purposes. Therefore, it is provided with great detail in section 1 how compensation for water furnished within municipalities may be collected—it being provided, among other things, that said compensation "shall be fixed" annually by the "governing body" of the municipality, and that said body shall be "subject to peremptory process to compel action in the matter," and to "penalties" for not taking action. The section also provides that if the persons or corporations furnishing water in municipalities shall collect "compensation" therefor otherwise than as established by the governing body, their franchise "and waterworks" shall be forfeited to the municipality. Whether the latter clause could be enforced is a question not arising in the case at bar, but it shows, as other provisions of section 1 show, that the convention, when dealing with the subject of water, had particularly in view the furnishing of water within municipalities, and determined that it would itself handle and legislate upon that branch of the subject so far as to leave little, if any, power to the legislature in the

premises. But nothing of the kind appears in the constitution about water rights and ditches existing and running through mining and agricultural districts, etc., outside of municipalities. As to this latter class of property, with respect to which private contracts for compensation for the use of water had been the rule, and apparently had been satisfactory to both purchasers and consumers, the convention, apprehending that there might come evils outside of municipalities somewhat similar to those feared within them, took the precaution of declaring, so that such would be the law beyond question, that the use of water appropriated for distribution and sale should be a public use, and subject to the regulation and control of the state. But it left to the legislature the power and discretion of regulating the sale of water outside of municipalities if the time should come when, in its wisdom, it thought such regulation was called for—or to allow the people to continue to freely contract on the subject as they had been accustomed continuously to do since before the state was organized as a government. In the light of the foregoing views, the provision of section 2 that the right to collect compensation for the use of water “cannot be exercised except by authority of and in the manner prescribed by law,” means that if the legislature shall by statute prescribe the particular manner in which the right shall be exercised, that manner (if it be reasonable) must be followed if consumers insist on it; but, in the absence of such statute, then “by authority of law” means by the authority of the general substantive law of the land in which all rights of property and its use or enjoyment are founded. Our conclusion is that the contract involved in the case at bar is not made invalid by the provisions of the constitution invoked by appellants.

We do not deem it necessary to extend this opinion by noticing in detail the various authorities cited by counsel. There is no doubt that the numerous decisions of this court cited by respondent impliedly, at least, uphold contracts like the one here in question; although there is, perhaps, some force in the claim of appellant that in most of those cases the points here made may have been overlooked. Both sides cite cases from Colorado, some of which are favorable to respondent's views, and others, no doubt, favorable to some

extent to the views of appellants. But the latter are, we think, mainly founded upon the provision of the constitution of Colorado—materially different from the provisions of our constitution on the subject—which declares that the water of all natural streams not theretofore appropriated is “the property of the public.” The question involved here has also been before the federal courts sitting in this state; but the result of their action, as will be hereafter seen, has been to leave it undecided.

The only act passed by the legislature touching the subject here under consideration which calls for special notice is the act of March 12, 1885. (Stats. 1885, p. 95.) There was another act on the subject passed March 12, 1880 (Stats. 1880, p. 16); but no action was taken under it, and it is very little discussed in the briefs of counsel. The later act of 1885 covers the subject, and supersedes most of the provisions of the act of 1880. In the act of 1885 the legislature does not, itself, undertake to prescribe any rule about compensation for water. It simply gives power of regulation to boards of supervisors in the event that they are petitioned to exercise such power by “not less than twenty-five inhabitants who are taxpayers,” etc. Upon such petition the supervisors are authorized to fix and regulate “the maximum rate at which any person, company,” etc., may sell, rent, or distribute water. The board or boards of supervisors in the county or counties in which respondent’s ditches are situated have, however, never taken any action under the statute, no petition for such action having been presented, and therefore there are no regulations of said boards to be considered; but appellants contend that respondent’s rights have been impaired or destroyed by some general provisions of the act. This contention, however, cannot be maintained. The statute, even if it can be said to have any effect in the absence of any action by the supervisors, clearly contemplates only the fixing by the latter of “maximum rates.” Section 8 of the act provides that anyone selling water must do so at rates “not exceeding the established rate”; and section 9 provides that any such person whose water rates “have been fixed and regulated by a board of supervisors” who shall collect water rates “in excess of such established rates” shall be liable in

an action for damages. There is nothing in the act making it illegal to contract for less than the maximum rates. Appellants contend that the act has some significance notwithstanding the fact that the supervisors have not acted, because it is provided in section 5 that until the supervisors shall have acted "the actual rates established and collected" by the water owners "shall be deemed and accepted as the legally accepted rates." This simply means that until compensation shall be fixed by the supervisors persons selling water shall continue to collect as they have been accustomed to do. It refers to things as they existed; it is in the nature of a recital; it is certainly not a command, as appellants seem to think, that the persons or companies referred to must by resolution or declaration, or by something in the nature of an ordinance passed by the municipal body, formally announce the terms upon which they will continue to distribute water. But even appellants' view is substantially met by the averment in the complaint that respondent "has been so engaged in conveying and furnishing water and charging and collecting therefor, particularly under contracts similar in form and substance to those set forth, alleged and described in this complaint"; and so we think that there is nothing in the statute invoked which makes the contract here in question invalid. Even if the supervisors had fixed the maximum rates, we see no reason why a consumer would not still have had the right to make a contract which he considered more advantageous to him than the established rate. This seems to be the construction given it by the legislature. By an act passed March 2, 1897 (Stats. 1897, p. 49), the act of 1885 was amended as follows: "Nothing in this act contained shall be construed to prohibit or invalidate any contract already made, or which shall be hereafter made, by or with any of the persons, companies, associations, or corporations described in section 2 of this act, relating to the sale, rental, or distribution of water, or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract." Several questions arising out of this amendment are discussed by counsel—as whether it expressly validates all former contracts like the one involved here, whether such

a contract could be thus validated, what the general effect of the amendment is, etc. Under our views of the case it is not necessary to determine these questions; but it may certainly be said that the amendment is a legislative construction, and, as such, entitled to consideration.

There is no question in the case at bar about the power of the state to fix compensation, nor the right of a consumer to demand water at rates which have been established, nor the equal distribution of water among consumers of the same class, nor the right to the continued use of water under section 552 of the Civil Code. Something is said by appellants about the money paid by their predecessors at the date of the contract—which is called by them a “bonus”—but it is difficult to see how that matter can now be brought into view, as the only moneys here involved are the yearly rentals; and even if it were involved here the payments of part of the rental in advance would certainly not vitiate the contract. Neither do we see, so far as this case is involved, any profit in considering the distinction sometimes made between the ownership of the use of water and the ownership of its *corpus*; that distinction in no way affects the right of a ditch owner to divert and convey water for distribution and rental.

The situation arising out of the decisions of the federal courts above referred to is this: In two or three cases, and particularly in *Souther v. San Diego Flume Co.*, considered in *San Diego Flume Co. v. Souther*, 90 Fed. Rep. 164, and *Lanning v. Osborne*, 76 Fed. Rep. 319, the learned judge of the circuit court of the United States for the southern district of California—for whose learning and ability as a jurist we have the very highest respect—expressed some opinions which are, no doubt, to some extent in discord with the views hereinabove expressed; but upon appeal in the *Souther* case to the United States circuit court of appeals the judgment of the lower court was reversed, and a decision made in accord with our views. (*San Diego Flume Co. v. Souther*, 90 Fed. Rep. 164.) Afterward, however, the circuit court of appeals granted a rehearing in the *Souther* case, for what reason we do not know; and as that court has not yet rendered another decision in the case, the question, so far as the federal courts are concerned, is left undecided. We think,

however, that the opinion rendered by the circuit court of appeals correctly declares the law upon the subject; and although a rehearing has been granted we desire to quote some of the language there used. The court say: "It becomes necessary, therefore, to determine whether the circuit court erred in ruling that 'under the constitution and statutes of California' a corporation created for the purpose of appropriating waters of the state, and delivering the same for irrigation, is bereft of the power to enter into contracts with the consumers thereof." The court, after quoting the language of the constitution, and referring to the said statute of 1885 and to various decisions upon the subject, and asking what the trend and purport of the decisions are, say: "They are to the effect that, notwithstanding the fact that the constitution declares that the use of waters of the state appropriated for irrigating purposes is a public use, and the further fact that, under the law of 1885, upon the petition of twenty-five consumers, the commissioners of the county may fix the rates to be charged by the company and paid by the consumers, nevertheless until such rates are fixed in pursuance of law, the corporation furnishing the water and the consumer receiving it are left free to make such contracts as they may see fit to make, and their agreements will be sustained in the court. In other words there is no provision of the laws of the state and no principle of public policy which inhibits such contracts."

Appellants cite a subsequent decision of that court in the case of *San Diego Land etc. Co. v. Sharp*, 97 Fed. Rep. 394; but the question was not there involved or decided

The suggestion of appellants that the law as they construe it does not cover the comparatively few instances where water is appropriated to be used exclusively on the land of the appropriators, has no pertinency to the question here involved.

The judgment appealed from is affirmed.

Van Dyke, J., and Garoutte, J., concurred.

TEMPLE, J., concurring.—I concur in the judgment, and generally in the opinion of Mr. Justice McFarland. But while I agree with the construction given to the act of 1885, to wit, that it only prescribes the maximum rates and does not prohibit special contracts between the suppliers and the con-

sumers of water, yet, in my opinion, the power to regulate conferred and enjoined upon the legislature by sections 1 and 2 of article XIV of the constitution is plenary, and the legislature may, if it sees fit, prescribe the only rates and the only terms upon which water may be sold, rented, or distributed. The legislature may deem it desirable not only by its regulation to prevent extortionate charges, but also to prevent favoritism or unjust discrimination. Until it does so, however, I think the parties interested are free to contract.

It is matter of less consequence, but I do not concur in the view that the cases of *Fresno Canal etc. Co. v. Rowell*, 80 Cal. 114², and *Fresno Canal etc. Co. v. Dunbar*, 80 Cal. 530, are, as authorities, entitled to much weight in this discussion. Nor do I think it a matter to excite our special wonder, if, as stated in the opinion, until within the last few years no one would have thought of doubting the right to so contract, that in suits brought some fourteen years ago neither counsel nor the court should have made such a point. But since in those cases the point was not raised and was not alluded to, it could not have been passed upon. The practice of this court is not to decide points involved on appeal unless they are actually raised. And the suggestion that such points are involved in a petition for a rehearing has not found much favor. True, the court has always claimed the right to raise points for itself when it is thought that the ends of justice demand it, but so well known is the practice that when the exception is made we are sure to get an earnest protest in a petition for a rehearing. It is a common occurrence in noticing authorities cited to observe that the point in hand is not discussed in them because not raised. The correct rule as to the value of precedents and the reason for it is stated by Chancellor Kent, in 1 Kent's Commentaries, 476, as follows: "If a decision has been made on solemn argument and mature consideration, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it." And the author further says that the value of precedents depends upon the number and uniformity of the decisions and the solidity

² 13 Am. St. Rep. 112.

of the reasons on which the decisions are founded, and the perspicuity and precision with which these reasons are expressed. Upon this basis the opinions cited do not possess much value.

There is in the opinion an expression utterly foreign to any matter involved here, which I fear may be deemed a suggestion of a doubt as to the validity of the provision for a forfeiture contained in section 1 of article XIV of the constitution. No one is demanding a ruling upon that matter here, and there is therefore no occasion to reserve such question, if it be a question. If it were a matter for us I should say there is grave doubt both as to the wisdom or justice of that provision, but I see no reason whatever to doubt its validity. A law prescribing a very excessive penalty sometimes secures practical immunity, and instead of securing the enforcement of the law, removes its sanction altogether.

Harrison, J., concurred in the concurring opinion.

Rehearing denied.

[S. F. No. 2030. Department One.—August 7, 1900.]

In the Matter of the Estate of NORA LANGDON, Deceased,
ELLEN IVERS et al., Appellants, v. J. W. BYRNE
et al., Respondents.

ESTATES OF DECEASED PERSONS—DISTRIBUTION TO SURVIVORS OF A CLASS—MATERIAL ISSUE—INTENTION OF TESTATRIX—CONSTRUCTION OF WILL—UNCERTAINTY—PAROL EVIDENCE.—Where a will devised and bequeathed the residue of the estate to three nephews of the testatrix, described merely as nephews, one of whom died before the death of the testatrix leaving no lineal descendants, and the petition of the survivors for distribution of the whole residue to them alleged that the three nephews were the only children of a sister of the testatrix, and that it was her intention to devise and bequeath such residue to them as a class of such children who should be living at the death of the testatrix, issue joined upon such allegation raised a material issue of fact; and the will is sufficiently uncertain upon its face to admit parol evidence upon that

issue to show the circumstances of the case, exclusive of the oral declarations of the testatrix, under section 1318 of the Civil Code.

ID.—FINDING OF FACT—SUPPORT OF DECREE—CONCLUSIVENESS UPON APPEAL.—A finding of fact made in view of the evidence of the circumstances of the case, that the testatrix intended to devise and bequeath the residue of her estate to the three nephews as a class is sufficient to sustain a decree distributing the residue of the estate to the surviving nephews; and such finding is conclusive upon appeal if it is not assailed as contrary to the evidence and the evidence is not disclosed in the record upon appeal.

ID.—DEFECTIVE DECREE—OMISSION OF SMALL LEGACIES—ORDER FOR CORRECTION—COSTS UPON APPEAL.—A defect in the decree of distribution in failing to contain a provision for the payment of small legacies, of five dollars each, will be ordered corrected in that respect by the trial court, without costs to the appellant.

APPEAL from a decree of the Superior Court of the City and County of San Francisco distributing the estate of a deceased person. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

T. C. Coogan, and Fitzgerald & Abbott, for Appellants.

W. B. Treadwell, for Respondents.

E. B. & George H. Mastick, and Matt I. Sullivan, for Executors.

GAROUTTE, J.—The deceased, Nora Langdon, died testate, leaving a will which contained, among other provisions, the following: "Eighth. All the rest and residue of my estate I give, devise, and bequeath unto my nephews, Callaghan Byrne, James W. Byrne, and Fred Byrne, in equal portions." In due course of administration J. W. Byrne and Callaghan Byrne, two of the aforesaid nephews, filed a petition for distribution, setting forth a copy of the will, and alleging that the estate was ripe for distribution. This petition further alleged that Fred Byrne, the third of the aforesaid nephews, died prior to the death of the testatrix, leaving no lineal descendants, and that said Fred Byrne and petitioners were the only children of Margaret Irvine, a sister of the testatrix. The following important allegation then follows: "That the intention of the said testatrix in the eighth subdivision of

said will was to devise and bequeath the residue of her estate to the said Callaghan Byrne, James W. Byrne, and Fred Byrne as a class—namely, as the children of her said sister, Margaret Irvine, and to those of said class only who should be living at the death of said testatrix; and upon the death of said Fred Byrne during the life of said testatrix, your petitioners became and are the sole survivors of said class, and are entitled to the whole of said residue.” An answer was filed to this petition for distribution by various parties interested as heirs of said testatrix, and by this answer it was denied “that the intention of said testatrix in the eighth subdivision of her will was to devise and bequeath the residue of her estate to said Callaghan Byrne, J. W. Byrne, and Fred Byrne as a class, or as children of her said sister Margaret Irvine, or to those of said class only who should be living at the death of said testatrix.” Upon the hearing of the petition the court made findings of fact, and by these findings declared the said allegations of the petition to be true, and ordered the residue of the estate to be distributed to Callaghan Byrne and J. W. Byrne, share and share alike. This appeal is prosecuted by some of the heirs from that decree.

It was alleged in the petition that the intention of the testatrix by her will was to devise and bequeath the residue of her estate to these aforesaid nephews as a class. This allegation was denied, and the finding of the court was in favor of the allegation of the petition. If the intention of the testatrix in this regard is to be determined from the provisions of the will alone, then the issue between the parties was one of law, but if the intention of the testatrix as to whether or not she purposed to give the residue of her estate to these nephews as a class was a question of fact, then the petition for distribution and the answer squarely presented an issue of fact upon which a finding was proper and necessary. Section 1318 of the Civil Code declares: “In case of uncertainty arising upon the face of a will as to the application of any of its provisions, the testator’s intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations.”

It may be conceded without question that uncertainty does arise upon the face of the will of this testatrix as to her in-

tention in making this residuary disposition of her property to these three nephews. Standing alone, the provisions of this will are surely vague and uncertain upon the matter of any class disposition of the residue of her property. It does not even appear by the face of the instrument that these nephews are the children of the same sister or brother. It does not even appear that they are all of the children of any particular sister or brother. It does not appear that they are the children of one of the sisters or brothers mentioned in the will. They even may be the children of Ellen Ivers, a sister having a son who was substantially remembered in the will. In view of these conditions it is quite apparent that upon the face of the will alone any disposition of the residue of the estate to a particular class presents a matter of the gravest doubt. It would seem, for these reasons, that the section of the code cited is directly applicable to the case here presented, and that the situation of this testatrix at the time she made the will, viewed in the light of the surrounding circumstances, could be shown by parol under the authority found in the foregoing section. Indeed, the case fits the section right well. In *Estate of Mackay*, 107 Cal. 308, where the proper application of a certain provision of the will was uncertain, the testator's intention in that regard was explained by parol evidence. In that case the court said: "The testator's intention in the clause of the will containing the legacy in question must be ascertained 'from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations.' (Civ. Code, sec. 1318.) The only evidence as to the circumstances under which the will was made, outside of the testator's oral declarations, is to the effect that respondent had been supported by the testator for fourteen years next before his death. . . . Construing the words of the will, however, in connection with the circumstance that respondent had been supported by the testator for a long period, and was in receipt of such support at the time of the making of the will, we are of opinion that the provision in question created a legacy for maintenance." It thus appears that, with the assistance of parol evidence offered under the aforesaid section of the Civil Code, a legacy was held to be a "legacy for maintenance."

We have entered somewhat into detail in the foregoing discussion, in view of the conclusion to which we have arrived—namely, the finding of the court that the testatrix intended to give the residue of her estate to these three nephews as a class was based upon a material issue of fact in the case, and unless that finding be successfully attacked here, the appeal cannot stand. But there is no pretense by the record that the finding is not supported by the evidence. Indeed, in view of the absence of any bill of exceptions containing the evidence addressed to an attack upon this particular finding of fact, we feel assured that it must stand, and so standing conclusively points to the judgment.

The decree of distribution is defective in failing to contain any provision as to the three legacies of five dollars each.

For the foregoing reasons the cause is remanded to the trial court, with directions to amend the decree as herein indicated, and that thereupon it stand affirmed, without costs to appellant.

Van Dyke, J., and Harrison, J., concurred.

Hearing in Bank denied.

[S. F. No. 1347. Department Two.—August 7, 1900.]

LILLIE RIFE, Respondent, v. UNION CENTRAL LIFE
INSURANCE COMPANY, Appellant.

LIFE INSURANCE—STIPULATIONS IN POLICY FOR PURCHASE WITH NET RESERVE—CONSTRUCTION OF CODE—WAIVER.—The provisions of section 450 of the Civil Code, requiring every life insurance policy delivered in this state upon the life of a resident thereof to contain certain stipulations specified in that section, in reference to the purchase with the net reserve of a term policy or a paid-up policy, in case of nonpayment of premium after three years' full payment thereof, do not have the effect to make such stipulations part of the policy, as matter of law, if not inserted therein, and, if they are so inserted, they are mere matter of agreement, which may be waived by the consent of the parties.

ID.—LOAN UPON POLICY—STIPULATION IN NOTE—PROTECTION OF SECURITY—WAIVER OF TERMS OF POLICY—FORFEITURE.—After pay-

ment of more than three years' premiums, where a cash loan was made upon the policy of nearly the full amount of the net reserve, and the note given therefor stipulates that if the policy shall at any time thereafter lapse for nonpayment of premium, all provisions in the policy for the issue of a paid-up or a term policy shall become null and void, such stipulation is a reasonable and valid protection of the security of the note, and operates as a waiver of the terms of the policy; and in case of nonpayment of premium thereafter, there is nothing in the laws of the state relative to forfeitures which makes against the enforcement of the condition so agreed upon.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hune, Judge.

The facts are stated in the opinion of the court.

Bishop & Wheeler, for Appellant.

The policy must be reasonably construed, where a loan is made upon it, for its deduction before application of the net reserve. (*Omaha Nat. Bank v. Mutual Ben. Life Ins. Co.*, 81 Fed. Rep. 935; 84 Fed. Rep. 122; Civ. Code, sec. 1655.) The express agreement of the parties contained in the note must control the terms of the policy, and the forfeiture therein provided for cannot be relieved against. (*Holly v. Metropolitan Life Ins. Co.*, 105 N. Y. 437; *Klein v. New York Life Ins. Co.*, 104 U. S. 88; *Douglas v. Knickerbocker Life Ins. Co.*, 83 N. Y. 492, 504.) The parties had the right to contract as they pleased and to waive the terms of the policy by consent. (*Straube v. Pacific Mut. Life Ins. Co.*, 123 Cal. 677.) The owner of the policy realized money on the reserve, and the stipulation of the parties was for the reasonable protection of the security. (*New York Life Ins. Co. v. Statham*, 93 U. S. 24, 34.)

John R. Aitken, for Respondent.

The policy must be construed most strongly against the company, and where its terms expressly provide against forfeiture, a collateral instrument ought not to be construed as rendering the terms of the policy void in that respect, but should be held void rather than the terms of the policy, so far as they conflict. (*Dwelling House Ins. Co. v. Hardie*, 37 Kan. 674; *Tutt v. Covenant Mut. Life Ins. Co.*, 19 Mo. App. 677; *Fithian v. Northwestern Life Ins. Co.*, 4 Mo. App. 386;

Symonds v. Northwestern Ins. Co., 23 Minn. 494.) Section 450 of the Civil Code is mandatory in its terms, and operates as a limitation upon the power of insurance companies doing business in this state. No contract can change or waive the law. (*White v. Connecticut Mut. Life Ins. Co.*, 4 Dill. 177; *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226; *Griffith v. New York Life Ins. Co.*, 101 Cal. 627¹; *Hermany v. Fidelity Mut. Life Ins. Co.*, 151 Pa. St. 17; *Equitable Life Assur. Soc. v. Nixon*, 81 Fed. Rep. 796; *Wallingsford v. Bennett*, 1 Mackey 303; *Branch v. Tomlinson*, 77 N. C. 388; *Curtis v. O'Brien*, 20 Iowa, 376²; *Carter v. Carter*, 20 Fla. 558³; *Recht v. Kelly*, 82 Ill. 147⁴; Freeman on Executions, 2d ed., sec. 216; Civ. Code, sec. 3513.) Where the company can be given all the compensation it stipulates to receive by way of deduction from the policy, there should be no forfeiture for default. (*St. Louis Mut. Life Ins. Co. v. Grigsby*, 10 Ky. L. Rep. 310; Civ. Code, sec. 3275.)

HENSHAW, J.—This is an appeal from the judgment. The action was to recover upon an insurance policy, and this appeal involves its construction and interpretation. On December 15, 1891, the defendant herein issued a twenty payment life rate endowment policy for five thousand dollars on the life of George W. Rife, the annual premium upon which policy was one hundred and thirty-six dollars and ninety-five cents. Lillie Rife, wife of the insured and plaintiff herein, was named as beneficiary in the policy. The insured, prior to his death, paid four annual premiums upon the policy, being the premiums due in advance on December 15, 1891, 1892, 1893, and 1894, respectively. No annual premium was paid on December 15, 1895. At the date of this default the reserve value of the policy was two hundred and seventy-seven dollars and twenty-six cents. Under its provisions this reserve value, applied as a single premium, would have purchased term insurance for the period of two years and twenty-eight days—a time which would have carried the risk beyond the death of the insured. But on the tenth day of November, 1894, Rife, the insured, together with his wife, the beneficiary, applied to

¹ 40 Am. St. Rep. 96.

² 89 Am. Dec. 543.

³ 51 Am. Rep. 618.

⁴ 25 Am. Rep. 301.

the defendant for a cash loan upon the policy, such privilege being one, among others, accorded the insured under its terms. The provision of the policy in this regard is as follows: "The company will loan on this policy as collateral security any amount not exceeding that named in the table below and corresponding to the number of annual cash premiums paid." Pursuant to this provision Rife and his wife secured a loan of two hundred and forty dollars upon the security of the policy, and executed their joint and several note to the company. The note contained this clause: "If said policy shall at any time lapse for nonpayment of premium, all provisions in said policy providing for the issue of a paid-up or a term policy shall thereupon and by reason thereof forthwith become null and void." The policy itself contained the following conditions and covenants: "After three years' premiums have been paid, except in case of failure to pay at maturity a premium note, the company will, upon legal surrender of this contract while in force, and the payment of all outstanding premium notes, issue a paid-up, nonparticipating life policy for the amount named in table 'A' on the following page. In case of default for nonpayment of premium after three years, and no legal surrender having been made, the insured having paid at maturity all notes given for premium, then this policy shall, without surrender, but upon the payment of all outstanding premium notes, become a paid-up term policy, without change of terms or conditons, except as to the payment of premiums and participation in profits, and continue in force for such time as one annual premium on this policy is contained in its reserved value according to the American four per cent table of mortality, at the end of which time this contract shall cease."

The covenants of the policy above quoted are in conformity with section 450 of the Civil Code. In *Straube v. Pacific Mut. Life Ins. Co.*, 123 Cal. 677, that section is construed, and it is held that its terms do not become a part of an insurance contract as a matter of law. The penalty for a failure to insert this provision is the liability of the insurance corporation to suffer forfeiture of its franchise upon proceedings instituted by the state, but the parties are competent to make such an insurance contract as they may agree upon. The decision in the

Straube case was handed down by this court after the original briefs in this cause were filed. Its interpretation of section 450 of the Civil Code relieves this case from the necessity of a discussion of this matter.

Rife, the insured, died while in default for nonpayment of premium upon his policy, but his death occurred at a time within which term insurance for the full amount of the policy (if he was entitled to term insurance) would have been in force. Plaintiff's action is founded upon a construction of the policy which entitles her to avail herself of such term insurance, and in this view she prevailed in the trial court. Upon the part of appellants it is insisted that the right to term insurance was lost under the terms of the written contract expressed in the note, when the Rifes made default in the payment of premium. Admittedly, they were in such default at the time of the death of Rife, and at the time of the commencement of this action.

Even were we not relieved from a consideration of the meaning of section 450 of the Civil Code, as applied to a contract such as this, it would be plainly inequitable to contend, as here respondents contend, that by virtue of that section, and of the provision in the policy relative to loans, one might borrow from the insurance company, upon the security of the policy alone, practically its full value, and at the same time by defaulting in the payment of premiums compel the company to destroy its security by converting the policy into one of term insurance. So manifestly unjust would be such a construction of the law that only upon compulsion would a court adopt it. But section 450 of the Civil Code provides that from the amount to be applied upon such term insurance is to be deducted "any indebtedness to the company on such policy." By the very terms of the policy itself the loan was to be made upon the collateral security afforded by it. The reserve upon this policy was two hundred and seventy-seven dollars and twenty-six cents. The note and interest amounted to two hundred and sixty-one dollars and seven cents, and if term insurance was to be permitted at all, it could only be for the time which would be covered by the difference between the reserve of two hundred and seventy-seven dollars and the indebtedness of two hundred and sixty-one dollars, or sixteen

The facts are stated in the opinion of the court.

T. I. Bergin, for Appellant.

J. C. Bates, for Respondents.

TEMPLE, J.—This action was brought to foreclose the lien of a street assessment for work done in 1892.

The plaintiffs, at the trial, following the usual practice in cases of this class, put in evidence the assessment, including the warrant, diagram, certificate of the city engineer, and a printed copy of a certain resolution of the board of supervisors, and rested. To this evidence, however, defendant made certain objections. The point of them all seems to be that the work was done in 1892, and the assessment bears date in 1895, and there is no explanation of this delay. No explanation was required to make the evidence admissible. The statute prescribes a special rule of evidence for this class of cases, which is that the papers designated "shall be held *prima facie* evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment, and diagram are based, and like evidence of the right of plaintiff to recover in the action." The purpose of the rule was to throw the burden of proof on this point on the defendant. If he contends that the proceedings did not authorize the assessment and warrant, he must show by affirmative proof in what defect consists. They are all presumed to be sufficient and regular from the very fact that the papers mentioned were made and issued. This presumption is not changed by the lapse of time. The affirmative of the issue is still on the defendant. (*Williams v. Bergin*, 115 Cal. 56.)

Defendant then introduced the record of what was done in the matter, and from this it appeared that in the advertisement for bids it was provided that they would be received until Saturday afternoon, February 6, 1892, at 4 o'clock. There is no evidence as to when the bid was put in, but it was opened and considered in the board of supervisors February 8, 1892. It is contended that it was not put in in time. The presumption is that it was, not only by virtue of the special rule of evidence above cited, but also because of

the presumption that official action is regular. It is not made to appear that any record was to be made of the putting in of the bid, and if there was such a requirement defendant did not prove that there was no such record. The *prima facie* case made by plaintiff placed upon defendant the burden of disproving it by sufficient evidence. If it was something which would not necessarily be shown by the record, he should have presented other proof.

The next point is, in my opinion, much more serious. The proposition is that Williams & Belser, the contractors, did not put in a bid.

The advertisement for bids contained the specifications for the work or references to those on file, and the conditions of the contract, which the successful bidder would be required to enter into, were fixed, and the proposal was an offer to perform the work and furnish the materials as specified, and an agreement that if the contract was awarded to the bidder he would enter into the formal contract required. The contract is formal, for upon the acceptance of a valid offer the terms and conditions, including prices, are all determined. The contract would then be complete if it were not for the requirement that the contractor shall contract in writing with the superintendent of streets, and the further provision that if he fails to do so the contractor forfeits his contract and the deposit made, or in case he gives a bond, it liable for the amount of the bond. But the offer or bid must be in such form as to be binding upon its acceptance, otherwise the bond would be of no avail.

It was required that each bid should be accompanied by a certified check or bond. This requirement is certainly an important one, calculated to prevent bogus and dishonest bids. The bids were required to be on blanks furnished by the board. The document called a bid in this case, omitting the portion which is tabulated for different kinds of street work, not material here, is as follows:

"San Francisco, February 6, 1892.

"To the Hon. Board of Supervisors, in and for the City and County of San Francisco:

"Gentlemen: In compliance with the annexed advertisement ——— hereby promise and agree to perform the work

and execute the contract specified therein to the satisfaction of and under the supervision of the superintendent of public streets and highways at the following prices, payable in U. S. gold coin, viz.:

	Paving, Curb, Sq. Ft. Lineal Ft.	
	Cents.	\$ Cts.
Curbs		1 05
Paving ..	26½	
<hr/>		
Total cost of work.....	\$	—"

It will be seen that the names of William & Belser do not appear in this blank, nor are the blanks so filled as to make it suitable for a contract, if it had been signed. It would still have been necessary to supply something by intendment. Of course, this paper by itself means nothing, but it was attached to a bond, which bond the law requires shall accompany the bid; and pasted to it were the printed proposals for the work as published by the board. In this bond Williams & Belser are principals, and it is conditioned "that whereas, the above bounden Williams & Belser is about to hand in and submit to the honorable, the board of supervisors in and for the city and county of San Francisco, the foregoing bid or proposal," etc. And again: "Now, if the bid or proposal of the said Williams & Belser shall be accepted, and the said work be awarded to him thereupon by the said board of supervisors, and he, the said Williams & Belser, should fail or neglect to enter into a contract therefor," etc. This bond was signed by Williams & Belser and others.

It is not claimed that the blank by itself would constitute a bid, even though it was actually received and acted upon as a bid submitted by Williams & Belser, but it is argued that being attached to the bond which was signed by Williams & Belser, and identified by reference in the bond, that it must be held sufficient. The reference and signature attached to the bond was an adoption and execution of the bid. But this reasoning assumes the point at issue. The reference is to a bid, which this blank paper is not, and if the reference can be assumed to be to this document, it mistakes the fact. If

the question were whether the reference is sufficient to identify the paper so as to make it a part of the document referring to it, the question would be different. Here the contention is that the reference gives life and validity to a document which without the reference would be void. Nor is the question whether Williams & Belser could be held upon it as a valid bid after the contract had been awarded to them and they had executed the formal contract. These supposed subsequent events, which might estop the contractors, do not affect this question. The property of the citizen is being taken *in invitum*, and in this requirement there is an element of benefit for him, and there must be substantial compliance.

The question is, If the contractors had been awarded the contract, and had then declined to enter into the formal contract, could a recovery have been had upon the bond? Plainly, I think, a recovery could not have been had. There is no consideration for the bond unless there is a bid. They are not one. The law requiring that the bid shall be accompanied by a bond recognizes their separate existence, and surely if there was not even the semblance of a bid the bond was without consideration, and its recital will not estop the sureties from showing it. It may be that merely formal defects could not thus be availed of after performance.

In *Argenti v. San Francisco*, 16 Cal. 27 9, it was held that the bid and its acceptance constitute a complete contract. Under the present law these facts would not make a contract for doing the work, but still the bid must be in such form that upon its acceptance a valid obligation is put upon the bidder to enter into the formal contract, all the terms of which are fixed, and, if he does not, will enable the city to enforce the penalty.

Among other matters in reply to this objection, the respondent contends that after the contract had been awarded and the work completed this objection cannot be raised. The matter was one for the board of supervisors, and their action is conclusive. But the matter is jurisdictional, and the defect one that could not have been corrected on appeal. The case of *Miller v. Mayo*, 88 Cal. 568, is not in point. The bond in question there was not the bond which accompanies the bid, but the bond given by the contractor at the time of executing the contract. The only defect in it was that it was approved

by the city trustees instead of by the superintendent of streets. It was said that the property holder cannot object to the failure of the superintendent of streets to approve the bond. This is saying, in effect, that the sureties would be bound although the bond was not properly approved. The contractor secured the contract by reason of the bond, and this was a sufficient consideration. But, whether right or wrong, it is not authority for the proposition that notwithstanding the strict provisions of the street law, the board of supervisors can make a valid contract for street work with one who was not a bidder.

There are many other points, the most serious one being in regard to the sufficiency of the demand, but the contract itself being void, it is not necessary to consider them.

The judgment and order are reversed.

McFarland, J., and Henshaw, J., concurred.

Hearing in Bank denied.

[S. F. No. 2277. In Bank.—August 7, 1900.]

HULDA R. TOWNSEND, Petitioner, v. F. M. ANGELLOTTI and CARROLL COOK, Judges of the Superior Court, etc., Respondents.

ESTATE OF INSANE PERSON—PAYMENT OF ATTORNEY—ORDER VACATING ALLOWANCE—DENIAL OF MOTION FOR REPAYMENT—SILENCE OF ORDER—MANDAMUS.—Where an order vacating the allowance of an attorney's fee out of the estate of an insane person, which had been paid, is silent as to a part of the motion therefor, which moved also for an order requiring the repayment of the fee into the estate, such silence is in legal effect a denial of that part of the motion, and *mandamus* will not lie to compel the judge to act thereupon.

PETITION for *mandamus* from the Supreme Court to the Superior Court of the City and County of San Francisco. Carroll Cook, Judge. F. M. Angellotti, Acting Judge.

The facts are stated in the opinion.

Foshay Walker, for Petitioner.

Carter P. Pomeroy, for Respondents.

THE COURT.—W. L. Pierce, in certain proceedings touching the guardianship of an insane person, had, by order of the superior court and of Hon. Carroll Cook, judge thereof, been allowed the sum of three thousand eight hundred dollars as attorney's fee, which sum was paid out of the funds of the insane person. Thereafter this petitioner, a party in interest, applied to the superior court for an order: 1. Vacating the order allowing said W. L. Pierce an attorney's fee of three thousand eight hundred dollars; and 2. Requiring the said Pierce to pay back into the funds of the insane person said three thousand eight hundred dollars, with interest. Hon. F. M. Angellotti, as a judge of the superior court, was called to hear and pass upon the application for said order. In due time he made and caused to be filed the following order:

"The motion of defendant for an order vacating and setting aside the order made herein on the 13th day of June, 1899, allowing an attorney's fee of three thousand eight hundred dollars to W. L. Pierce, and directing payment of the same, and requiring the payment thereof by said Pierce, having come on regularly for hearing on the 9th day of December, 1899, and the hearing of the same having been regularly continued to a subsequent date, and such hearing having been had and the matter submitted to the court for decision on the 17th day of January, 1900, and the court being now fully advised, it is ordered that the said order of June 13, 1899, be and the same is hereby vacated and set aside.

"Dated February 28, 1900.

"(Signed) F. M. ANGELLOTTI,

"Judge Presiding in said Court."

The petitioner here insists that this order fails either to grant or deny her application for an order compelling Pierce to repay the three thousand eight hundred dollars into the funds of the insane person's estate. This is an application for a writ of mandate to compel the judge to determine such

application. We think it should be denied. The order actually made contains recitals sufficient to show that all the matters applied for were in the mind of the court. When it made its order as it did vacating the order for the payment of attorney's fees and going no further, it was the plain equivalent of an express refusal to order the repayment of the money, and the petitioner would be justified in treating the silence of the order as a denial of her motion.

Let the writ be discharged.

[Crim. No. 682. In Bank.—August 7, 1900.]

In re JAMES TAYLOR ROGERS, on Habeas Corpus.

CRIMINAL LAW—WITNESS BEFORE GRAND JURY—REFUSAL TO ANSWER—PERTINENCY OF QUESTIONS—INCRIMINATION OF WITNESS—CONTEMPT.—Where a witness who was subpoenaed before the grand jury to testify upon the examination of a charge against another person for forging a check given in payment of the interest of an alleged heir of an estate, whose existence was a subject of inquiry, refused to answer questions propounded to him, including a question as to whether the accused did not inform the witness that the alleged heir was not the legal heir of the deceased, on the grounds that the questions were not pertinent to the matter under inquiry, and that the answers might tend to incriminate him and degrade his character, it is sufficient to sustain a punishment for contempt for refusal to answer that the one question so included appears to have been pertinent to the charge under inquiry, and that it did not appear and was not fairly shown to the court that an answer of the witness thereto would have a tendency to incriminate him or to degrade his character.

HABEAS CORPUS in the Supreme Court to test the validity of a punishment by the Superior Court of the City and County of San Francisco of the petitioner for contempt in refusing to answer questions before the grand jury. Frank H. Dunne, Judge.

The facts are stated in the opinion of the court.

Henly & Costello, for Petitioner.

Lewis F. Byington, *contra*.

HENSHAW, J.—The petitioner was subpoenaed before the grand jury sitting in the city and county of San Francisco, and having been sworn as a witness before that body, there were propounded to him certain interrogatories. Upon his refusal to answer, the foreman of the grand jury made affidavit setting forth at length the questions which had been propounded to the contumacious witness, and stating that the body of which he was foreman was engaged in the consideration of a charge of felony against one John M. Chretien as to whether said John M. Chretien had forged the indorsement "John Sullivan" on a check. The check was alleged to have been given in payment for the interest of John Sullivan, the alleged heir of Joseph Sullivan, deceased, in the estate of Joseph Sullivan, deceased, and (so proceeds the affidavit) "it then and there became material to know whether said John Sullivan was the brother and lawful heir of said Joseph Sullivan, deceased, and as to whether any such person as John Sullivan was in existence." This affidavit having been presented to the presiding judge of the superior court, Rogers was cited to appear, and did appear, and made a showing why he should not be compelled to answer the questions propounded. After hearing, the court made its order and judgment that the questions propounded were each and all legal, proper, and pertinent to the matter under inquiry by the grand jury, and directed this petitioner, when next called before the grand jury, to answer them. Again called before the grand jury, the witness again refused to answer, justifying his contumacy upon the ground: 1. That the questions were not relevant or pertinent to the matter under inquiry; and 2. That the answers to them might tend to incriminate him and to degrade his character. As to the relevancy and pertinency of the questions propounded it is sufficient to say that the decision of that matter rests with the judge and not with the witness, but that the decision of the judge at *nisi prius* is reviewable by this tribunal under the writ. (*Ex parte Zeehandelaar*, 71 Cal. 238.) Otherwise the production of evidence would cease to be under the control of the court, and would depend upon the opinion of the witnesses.

If any one of the eleven interrogatories propounded to the witness appears to have been relevant and pertinent to the

matter under inquiry, the witness' refusal to answer this question must be at his peril. If it be relevant and pertinent, he will be protected in his refusal to answer, if it appear that it will have a tendency to incriminate him, or will have a direct tendency to degrade his character, and the question be not addressed to the very fact in issue or to a fact from which the fact at issue will be presumed. (Code Civ. Pros., sec. 2065.) In most instances the question propounded to a witness will upon its face disclose whether or not it has a tendency so to incriminate or degrade. If this does not appear by the question itself, as if the question be innocent in form but some possible answer to it might so tend to incriminate or degrade, then it is the duty of the witness to make it appear to the court that his answer might at least have this tendency. It is for the court to pass upon the sufficiency of the objection which the witness urges to answering, and not for the witness to decline to give relevant and pertinent testimony which may be harmless to himself, upon his mere declaration that his answer may tend to incriminate or degrade him.

Of course, the decision of the trial court is here reviewable. We need not be at pains, then, to examine all of the questions propounded to this witness, with a view to determining their relevancy and pertinency. If any one be relevant and pertinent, for his refusal to answer it the witness was properly adjudged to be in contempt, unless he fairly showed that his answer would have a tendency to incriminate or degrade him.

Amongst the questions thus propounded was the following: "Q. Did John M. Chretien inform you that John Sullivan was not the legal heir of Joseph Sullivan, deceased?"

The relevancy and pertinency of this inquiry to the matter under investigation by the grand jury is apparent, and is made so by the affidavit of the foreman presented to the court. Chretien's knowledge as to whether John Sullivan was an actual or fictitious person, and Chretien's knowledge as to whether the so-called John Sullivan was in truth the lawful heir of Joseph Sullivan, deceased, were matters having a pertinent bearing upon the criminal charge against him which was being investigated. The witness, then, could not ground his refusal to answer this question upon any lack of pertinency, nor does it appear from the language of

the question, nor is it made to appear at all, that his answers to the question would either have a tendency to incriminate him or degrade his character. It appears, therefore, that as to at least one interrogatory (and this inquiry need go no further) the witness' refusal to answer was not justified in law, and that, therefore, he was properly adjudged to be in contempt.

Let the writ be discharged and the prisoner remanded.

Harrison, J., Van Dyke, J., and Garoutte, J., concurred.

Rehearing denied.

[S. F. No. 1994. Department Two.—August 8, 1900.]

DAN. O'TOOLE, Appellant, v. JAMES J. DOLAN and
HALL McALLISTER, Respondents.

SALE OF MINE—WRITTEN CONTRACT—ORAL AGREEMENT FOR COMMISSIONS—ASSIGNMENT OF WRITTEN CONTRACT—BONUS TO ASSIGNEE—RIGHT TO SHARE COMMISSIONS PAID.—Where the owners of a mine agreed in writing with another person that if he should pay or cause to be paid a specified sum on or before a fixed date, they would bond the mine for an agreed price, and orally agreed to pay him fifteen hundred dollars, if a sale for such price should be affected, and then assigned the written contract to a third person without assigning his right to any part of the agreed commission, and the assignee received a bonus from one who became a purchaser of the mine, such assignee is not entitled to any share in the fifteen hundred dollars paid in execution of such oral agreement.

ID.—CLAIM BY ASSIGNEE TO ONE-HALF OF COMMISSIONS—ISSUE AS TO AGREEMENT—FINDING AS TO ASSIGNMENT.—Where the assignee of the contract claimed one-half of the commissions orally agreed upon between the vendors of the mine and his assignors, and in a suit to recover one-half thereof deposited by the vendors of the mine to abide the controversy, alleged that the other half previously paid to the assignor was in full for his share, and that in consideration of the assignment of the contract to him it was agreed between himself and his assignor that the commissions should be equally divided between them, and that the vendors had notice of such assignment and agreement, a finding that no assignment of the commissions was made by the assignor of the contract to the

assignee, includes a verbal as well as a written assignment, and though not as specific as it should have been, sufficiently passes upon the issue tendered as to whether the agreement was made as alleged, so as to entitle the plaintiff to recover the money deposited by the vendors of the mine.

ID.—OMISSION TO FIND AS TO DEFENDANT'S SHARE.—Where the findings sufficiently show that plaintiff had no interest in the commissions orally promised by the vendors of the mine, an omission to find upon an issue as to whether defendant had received his full share thereof is immaterial.

ID.—MODE OF EFFECTING SALE IMMATERIAL.—As to the vendors of the mine, the sale must be deemed to have been effected through the agency of the one to whom the commissions were promised, and it was immaterial to them what mode was used by him in effecting the sale, whether he personally found a purchaser or found one through the agency of an assignee of the contract.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion.
Isaac Frohman, for Appellant.

Henry K. Mitchell, and J. H. Rogers, for Respondents.

HAYNES, C.—This is an action to determine conflicting claims of plaintiff O'Toole and defendant Dolan to the sum of seven hundred and fifty dollars placed in the hands of defendant McAllister by Parker and Shimer to abide the determination of the controversy. The cause was tried by the court, and findings and judgment were for defendant Dolan, and plaintiff appeals from the judgment and from an order denying a new trial.

Parker and Shimer were the owners of certain mines, and on June 9, 1897, entered into a contract in writing with Dolan, by which they agreed that if Dolan should pay or cause to be paid to them one thousand dollars on or before July 9th, they would execute a bond for the sale of the mine for the price of ten thousand dollars, four thousand five hundred dollars to be paid in six months, and four thousand five hundred dollars in one year from the date of the bond. Besides this written agreement, Parker and Shimer orally agreed to pay

Dolan fifteen hundred dollars in case a sale for said sum should be effected for them. On June 18th Dolan assigned said written agreement to the plaintiff, who within the time limited assigned the same to another party, who paid O'Toole five hundred dollars bonus or commission, and paid to Parker and Shimer said one thousand dollars within the time limited, and afterward completed the purchase. Afterward Parker and Shimer, upon the payment to them of one-half the purchase money, paid Dolan seven hundred and fifty dollars, being one-half of the promised compensation for effecting a sale. Six months afterward, the remainder of the purchase money having been paid, Parker and Shimer offered to pay the remaining seven hundred and fifty dollars, which is the subject of this action, and as Dolan and O'Toole each claimed the money it was deposited with Mr. McAllister as above stated.

1. Appellant contends that the main and most material issue raised by the pleadings and tried by the court, viz., "whether or not it was agreed between O'Toole and Dolan that the fifteen hundred dollars commission should be equally divided between them," was not found upon by the court. The court found "that said Dolan never assigned his said agreement with Parker and Shimer for the payment to him of said sum of fifteen hundred dollars aforesaid, or any part thereof, to said plaintiff or to any other person."

The complaint alleged that defendant Dolan "assigned and transferred to plaintiff all his, said Dolan's, rights under said agreement with said Shimer and Parker, and in consideration thereof it was agreed between plaintiff and said defendant that said sum of fifteen hundred dollars should be divided equally between themselves; that said Shimer and said Parker had knowledge of said assignment and said agreement between plaintiff and defendant Dolan."

Defendant Dolan, among other things, denied "that in consideration thereof, or at all, it was agreed between said plaintiff and said defendant that said sum of fifteen hundred dollars, or any other sum, should be divided equally, or at all, between them."

There was no issue or controversy as to the fact of the as-

ID.—ESTOPPEL—RES ADJUDICATA—COUNTERCLAIM IN FORECLOSURE SUIT—CONNECTION WITH SUBJECT OF ACTION—ASSIGNMENT OF CLAIM.—

A claim for the recovery of money paid to a mortgagee under a mistake of both parties that he was entitled to the crops of which it was the proceeds, which had been assigned by the mortgagor before answer was filed in the foreclosure suit, is not so legally connected with the subject of the action as to be barred by failure to plead it as a counterclaim; but the assignment was evidence of the election of the mortgagor that the money should be recovered in a separate action, and the assignee's rights could not be affected by any counterclaim or defense made by the assignor.

ID.—COUNTERCLAIM UNDER EXPRESS AGREEMENT—MONEY PAID UNDER MISTAKE NOT INCLUDED.—

A counterclaim set up by the mortgagor in the foreclosure suit under an express agreement of the mortgagee to pay a fixed sum to the mortgagor, which included the proceeds of the mortgagor's crops and other money, for a deed to be made by the mortgagor, which counterclaim was found against him, did not include or affect the right of the mortgagor or his assignee to recover the money paid to the mortgagee under mistake.

ID.—DEATH OF DEFENDANT PENDING SUIT—PRESENTATION OF CLAIM—

REVIVAL OF SUIT AGAINST EXECUTORS—LIMITATION OF THREE MONTHS—CONSTRUCTION OF CODE.—Where the defendant in an action dies pending suit, all that is required of the plaintiff is the presentation of the claim within the time limited therefor. Section 1498 of the Code of Civil Procedure, limiting the commencement of an action upon a rejected claim which is past due to the period of three months, has no application to an action already pending; and the fact that the suit may have been revived against the executors more than three months after the rejection of the claim cannot affect the cause of action.

ID.—CLAIMS AGAINST ESTATE—NONACTION OF EXECUTOR OR ADMINISTRATOR—OPTION OF CREDITOR.—

Where an executor or administrator takes no action upon a claim, neither approving nor rejecting it, the creditor may exercise his option to regard it as rejected only at the time of or shortly before the bringing of a suit thereupon.

APPEAL from a judgment of the Superior Court of Solano County and from an order denying a new trial. A. J. Buckles, Judge.

The facts are stated in the opinion.

Henry N. & Jabish Clement, and George A. Lamont, for Appellants.

J. M. Gregory, Respondent *in pro. per.*

SMITH, C.—The plaintiff, as assignee of one Blake, brought suit against Clabrough for the sum of six hundred and thirty-two dollars and eighty-five cents, which, it is alleged and found, "Clabrough in his lifetime received for and on behalf of . . . Blake . . . to be held by said . . . Clabrough until demanded by the said . . . Blake." On the death of Clabrough the suit was continued against his executors, against whom judgment was rendered. The defendants appeal from the judgment and from an order denying a new trial.

The facts out of which the controversy arose are as follows: Clabrough had a mortgage on Blake's ranch for the amount, including interest, of nineteen thousand two hundred and twenty-seven dollars and sixty cents, for which a suit to foreclose was pending, and the parties were negotiating for a conveyance of the mortgaged premises to Clabrough in satisfaction of the mortgage. Under these circumstances Clabrough and Blake came to the office of Preston, the attorney of the former, to consult him about the proceeds of the crops then growing upon or recently severed from the mortgaged land; which—referring to the proceeds—"Blake stated . . . certain creditors of his were about to attach or might attach"; or, "in other words, these proceeds were in jeopardy of being lost." Thereupon they were advised by the attorney that the mortgage "covered not only the land but the rents, issues, and profits," and that Clabrough "should receive [the money] because he was entitled to it under the clause giving him the rents, issues, and profits of the ranch." The money was afterward received by Clabrough under this understanding. There was no promise that the money should be repaid to Blake on demand or otherwise. But there was a proposition from Clabrough to Blake—whether then pending or subsequently made does not appear—that, upon the conveyance of the mortgaged premises by Blake and his wife to Clabrough, the latter would pay to him, or them, the amount thus received and two hundred and fifty dollars in addition. This proposition was accepted by Blake, and a deed executed by him; but his wife refused to join in the deed, and Clabrough was unwilling to dispense with her signature. The negotiations thus failing, the foreclosure suit was prosecuted to judgment, under which the premises were

sold. The money received by Clabrough was not credited on the mortgage or allowed in the judgment. The claim of Blake was assigned to the plaintiff, and, on Clabrough's death—pending the suit brought by the plaintiff to recover it—was duly presented to his executors on the nineteenth day of August, 1896, but was neither approved or disapproved by them. An "amended and supplemental complaint," setting up these facts, was filed May 19, 1897.

The points urged for reversal—so far as material—are that there was no promise on the part of Clabrough to repay the money to Blake; that the money was paid to Clabrough for the purpose of defrauding the creditors of Blake; that the plaintiff was estopped by the judgment in the foreclosure suit; and, finally, that his cause of action was barred by the provisions of sections 1496, 1498, 1500 and 1501 of the Code of Civil Procedure.

1. On the merits, the case was very plainly for the plaintiff. The money was paid to Clabrough on the advice of Mr. Preston to him and Blake that the former was entitled to it under the mortgage; which was clearly not the case. (*Simpson v. Ferguson*, 112 Cal. 180¹; *Modesto Bank v. Owens*, 121 Cal. 223.) The money was paid, therefore, under a mistake of law common to all the parties (Civ. Code, sec. 1578), and hence must be regarded as paid to Clabrough to the use of Blake. (*Kreutz v. Livingston*, 15 Cal. 346; 1 Chitty on Pleading, 362, note, 2; *Moses v. McFarlan*, 2 Burr. 1012; *Lockwood v. Kelsea*, 41 N. H. 187.) The promise to pay on demand is implied by the law; it was unnecessary to allege or to prove it. (*Wilkins v. Stidger*, 22 Cal. 231.²)

2. There was no issue as to fraud in the case; and no evidence tending to prove fraud. On the contrary, it appears from the evidence that the money was paid to Clabrough under the mistaken belief of all that he was entitled to it as mortgagee; there was no fraud in paying him what was believed to be his own.

3. The claim of estoppel is based on two grounds, namely:
1. That Blake's claim was proper matter for counterclaim

¹ 53 Am. St. Rep. 201.

² 83 Am. Dec. 64.

under subdivision 1 of section 438 of the Code of Civil Procedure, and was barred under the provisions of section 439 for failure to set it up; and 2. That it was in fact set up in the answer and adjudicated adversely to Blake; but neither of these contentions can be sustained.

If Blake's demand was a proper subject for counterclaim, it must have been so, under the second clause of the subdivision, as a cause of action "connected with the subject of the action," i. e., in the foreclosure suit. This clause is very vague and general, and its precise meaning has not as yet been determined. (Pomeroy on Code Remedies, secs. 793, 794; Bliss on Code Pleadings, secs. 126, 373.) But we may at least assume that the clause refers to some sort of real and legal connection. Here the only connection was that of the mistaken impression that the money belonged to the mortgagee; but this was apparent only, and not real. Blake was entitled to recover back the money, and on his election to do so—which was evidenced by his assignment to the plaintiff—the apparent relation ceased.

Nor can it be said the claim was in fact adjudicated. The defense set up by Blake in the foreclosure suit was an alleged agreement between him and Clabrough, by which the latter was to pay him eight hundred and ninety dollars and release the mortgage in exchange for Blake's deed. The decision of the court simply negated this claim, and did not in any way affect the right of Blake or his assignee to recover the money paid by mistake. Indeed, the assignment had been made several months before the answer was filed, and the assignee's rights could not be affected by any defense set up by the assignor.

4. Section 1498 of the Code of Civil Procedure can have no application to a case like the present, where the action was already pending when the claim was presented. All that is required of the plaintiff in such case is simply to present his claim. (Code Civ. Proc., sec 1502.) The point intended seems to be that the suit was not revived against the executors for over three months after the claim was rejected. But there is no provision of the code requiring that it should be revived within any definite period. It may be added that it appears from the record that the claim was neither approved nor rejected by the executors, and that plaintiff exercised his option

which they now hold, they found those stakes intact and adopted them, their notice of location referring to these stakes; and defendant contends that the location was invalid because plaintiffs did not actually put up new stakes. This contention is not maintainable. These stakes so distinctly marked the location of the ground that its boundaries could be readily traced; and this was all that the statute requires. As the stakes referred to already stood at the proper places, it would have been a useless work to have taken them out and put them in again, or to have replaced them with other stakes. The location was, in this respect, sufficient under the principles stated in *North Noonday Min. Co. v. Orient Min. Co.*, 6 Saw. 311; *Jupiter Min. Co. v. Bodie Con. Min. Co.*, 7 Saw. 96; *Seidler v. La Fave*, 5 N. Mex. 44, and cases there cited. In the last-named case the notice of the location of the Miners' Dream—the claim in contest—stated that the claim “commences at the northeast corner of the Iron King mine, and extends along the eastern boundary of the Iron King claim, in a southwestern direction to the southeastern corner of the Iron King mine”; thence, in various directions to the point of beginning; and it was held sufficient if there were, in fact, monuments at the northeast and southeast corners of the Iron King; and this was under a statute of New Mexico, which was much more stringent as to monuments than the United States statute.

2. We think that there was sufficient evidence to warrant the court in finding that the plaintiffs had discovered a lode before their location in 1894; although the plaintiffs, who seemed to have taken this fact for granted, could evidently have put the matter beyond a doubt by simply asking any one of their witnesses a direct question upon that subject. They, as before stated, had located this claim several years prior to 1894, and had done a good deal of work on it. They had sunk a shaft twenty-five or thirty feet deep, and had taken from it a considerable amount of quartz rock which formed a dump. The witness Heisser, who had worked for plaintiff, testified that some years before the last location he found rich rock on the south end of the claim, and informed one of the respondents of this fact, and warned him that the claim was jumpable, and that he afterward got rock both

from the shaft and the dump to show an expert. The witness Moise, when testifying about measuring the claim, said: "I measured along the lode line about the middle of May. I measured from the center of the shaft in Bear creek twelve hundred feet along the course of the vein, so far as I could judge its course; as the ground is all capped there is no rock in place at the surface. I took my directions for the course of the vein from a line drawn from the shaft through two or three prospect holes on the northern end of the claim where the ledge is exposed"; and although this was after the location of 1894, still it has a bearing on the question, for the testimony is fairly susceptible of the meaning that the vein was exposed in the shaft, which plaintiffs had sunk several years before their second location. The plaintiff Conway testified—indirectly, to be sure—to his knowledge of the vein at the time of the location, as appears from the following question and answer: "Q. What direction does the vein run upon which you posted this notice? A. North and south." The defendant himself, when on the witness stand, testified as follows: "Some work had been done south of the shaft in Bear creek in the direction of my tunnel that I know of in 1885 and '6. It was done almost on my line in the direction of my shaft from the tunnel—between—on the vein. I was there when the work was in progress in 1886. At that time Mr. Conway and Mr. Heisser were working there. That work was inside the boundaries of my claim, probably three hundred feet south of my north line. The rock was gold bearing." Now, there is no doubt whatever that there actually is, and, of course, at the date of the location was, a gold-bearing lode there—the appellant so avers in his answer, and proves by his testimony; and, considering all the evidence, we cannot say that the court was not warranted in holding that the rock taken by respondents and placed on the dump was not mere float rock, but rock taken from the lode which all admit to be there; and that, consequently, respondents knew of the existence of the lode when their location in 1894 was made. The evidence on the point was, of course, not very direct and explicit, but it was sufficient to sustain the finding.

3. There was sufficient evidence to justify the court in finding that the premises were vacant United States public

land, subject to appropriation at the time of respondents' location, although here again the plaintiffs evidently could have made the matter clear by asking a direct question on this subject. Very little evidence on that subject is required as against a subsequent locator who asserts no title antedating his location. Appellant testified himself that at the time he made his location, which was only four months after that of respondents, the land was unoccupied by anybody, and was "vacant government land"; and the testimony of respondents shows that they had located and worked the mine several years before their location in 1894; that they had placed stakes around the claim and had sunk a shaft and taken out rock, and that when they went back there in April, 1894, they found the stakes, the shaft, and the claim in the same condition, substantially, in which they had left them, and there is no evidence or pretense that any person other than respondents and appellant ever occupied this land or set up any claim to it. This was sufficient to warrant the court in finding that the land was vacant; certainly it cannot be said that the court should have found otherwise on this point.

In addition to the foregoing points, appellant contends that respondents cannot maintain this action, because before its commencement they had conveyed whatever title they had to third parties, to wit, William S. Zeller, W. H. Moise, and T. P. Bisland. The evidence on this point consists of three written instruments, one of which is a contract between the parties by which the respondents agree to sell to said Zeller and others certain properties called the "Conway" and "Zimmerman" mining claims, for the sum of six thousand dollars, to be paid on or before the seventh day of April, 1898; another of which is a deed which on its face conveys said claims from respondents to said Zeller and others; and the third being a deed which purports to convey the said claims from said Zeller and others to the respondents. The three instruments were all executed at the same time and constitute parts of one transaction. The deed from the respondents to Zeller and others went into the possession of the latter, and the deed from Zeller and others to respondents was given to another party as an escrow, to be delivered to the respondents upon the failure of Zeller and others to comply with their part of the said contract. Appellant contends that the first-named

deed was actually delivered to Zeller and others, and passed to them absolutely the legal title. Respondents testified, however, that the giving of the deed into the possession of Zeller and others was not intended as an absolute delivery so as to pass title; and we think the court was warranted in holding that the three instruments construed together as forming one transaction constituted nothing more than a contract to convey—a mere option given Zeller and others to purchase the property within a stated time for a named amount. And this, we think, was a correct conclusion regardless of the fact that the instruments in question do not mention the “Belmont” mine.

The points above noticed are in their nature highly technical; but appellant makes another contention which, if maintainable, would go somewhat to the merits. It appears that at one time, the respondent Conway, after some conversation between him and the appellant about their conflicting interests, put three stakes across the Belmont location some considerable distance north of the line claimed by respondents as their southern line; and it is contended by appellant that respondents were estopped thereby from claiming any ground south of the line. We do not think, however, that this contention can be maintained. The other respondent, Zimmerman, Conway’s cotenant, never saw or heard of these stakes; and while Conway’s explanation of the reasons why he put them there is somewhat unsatisfactory, he himself shortly afterward repudiated them, and we do not think that the evidence shows the elements which constitute an estoppel. Moreover, appellant’s answer shows that he claimed that the boundaries of the “New Discovery” extended to their original limits and far north of these stakes set up by Conway, and in his testimony he admits that he did not consider himself bound by those stakes as his northern boundary, but claimed to the limits of his original location.

The court found that fifteen hundred feet running southerly along the ledge from respondents’ northern stake and shaft, as described in their notice of location, would end a short distance north of what respondents claim to be their southerly end line, and confined the claim of the respondents to the actual fifteen hundred feet, and in this we see no

the defendant was a member of such society. The fact that he had a letter therefrom in his possession does not tend to show that he was a member thereof, or to connect him therewith, so as to justify such evidence.

1D.—IMPEACHMENT OF WITNESS.—Evidence of the bad character of such society is not admissible for the purpose of degrading and impeaching the defendant as a witness. Neither the defendant nor any witness can be impeached or degraded in that way.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order denying a new trial. Joseph W. Hughes, Judge.

The facts are stated in the opinion of the court.

John W. Johnston, and John V. Powers, for Appellant.

Tirey L. Ford, Attorney General, and C. N. Post, Assistant Attorney General, for Respondent.

GAROUTTE, J.—Defendant has been convicted of murder, and appeals to this court.

Defendant was arrested some months after the commission of the homicide. When arrested he was searched, and upon his person were found two letters purporting to have been written by a Chinese society known as Suey Ying Tong, and addressed to another Chinese society known as Woo Soon Tong. The contents of these letters were to the effect that the friends of the dead man and the officers of the law were upon the track of the defendant, and this society to whom they were addressed was directed to give him information to the end that he might take precautions in the matter of changing his residence. We do not see the importance of these letters, especially in view of the fact that defendant was in no way connected with the sender of them, and no evidence was introduced tending to show that he acted upon their contents in any way. (*People v. Colburn*, 105 Cal. 648.) While flight is evidence of guilt, the advice or suggestion of third parties to a defendant that he flee is not. It is the fact of flight that is material and competent evidence, and not what third parties may do or say with reference to the flight. The defendant took the witness stand and stated that he did the killing in self-defense, and also stated that he had received letter from his friends warning him of the danger of arrest,

and further stated that he changed his residence in order to avoid arrest, and at the suggestion of the letter he had received. In view of these facts which the record discloses, we do not perceive any injurious error committed upon the part of the trial court in the admission of these letters in evidence. At the same time, upon a second trial we now see no legal reason why they should be placed before the jury.

Price, a witness for the people, testified that the Chinese society known as the Suey Ying Tong, the party writing the aforesaid letters, was a highbinder society, a secret society, a tong, "one that can be hired for murder or blackmail, or anything you want for money." This evidence, upon every principle of criminal law, should not have gone to the jury. In ordering its admission the trial court stated that it tended to show the character of the defendant. We are at a loss to see how it had any such tendency, for there is not a particle of evidence that the defendant was a member of this tong. There was not even a particle of evidence to the effect that he had any personal knowledge of its existence. The sum and substance of the evidence is that he had in his possession at the time of his arrest two letters written by this tong, directing another tong to inform him of the danger surrounding him. That evidence is wholly too weak to connect defendant with this tong as a member, or even as an associate of its members.

There is another objection to the admission of this evidence of the witness Price, possibly more substantial than the one to which allusion has already been made. The evidence was offered by the prosecution for the purpose of degrading and impeaching the defendant. It was admitted by the court for that purpose. Yet, it is the law of this state—and we believe of every other state—that neither the defendant nor any witness can be impeached or degraded in this way. The effect of this evidence of necessity must have been greatly prejudicial to defendant in the eyes of the jury, and therefore its admission was an error that demands a new trial.

For the foregoing reasons the judgment and order are reversed and the cause remanded for a new trial.

Van Dyke, J., Harrison, J., Henshaw, J., and Temple, J., concurred.

[S. F. No. 1413. Department One.—August 11, 1900.]

In the Matter of the Estate of JACOB RICH, an Insolvent Debtor. SANTA CLARA VALLEY MILL AND LUMBER COMPANY, Appellant, v. JACOB RICH, Respondent.

INSOLVENCY—OPPOSITION OF CREDITOR TO DISCHARGE—SPECIFICATIONS—SEPARATE DEFENSES.—The specifications of a creditor of an insolvent debtor in opposition to his discharge are in the nature of separate defenses thereto, and any of them which show sufficient ground for the opposition must be answered and found in favor of the debtor to entitle him to his discharge.

ID.—QUALIFIED RULINGS—SUFFICIENT SPECIFICATIONS UNANSWERED—ERRONEOUS DISMISSAL AND DISCHARGE.—After qualified rulings striking out part of the specifications of the creditor, and sustaining a demurrer to several others for ambiguity and uncertainty only, where others are left unanswered which set forth fraudulent conduct of the insolvent sufficient to deprive him of the right to a discharge, such unanswered specifications render a dismissal of the opposition for failure of the creditor to amend it after the ruling upon the demurrer for uncertainty, and a consequent discharge of the insolvent, erroneous, and subject to reversal upon appeal.

ID.—GENERAL AND SPECIAL DEMURRER—FORM OF RULING IMMATERIAL.—The form of ruling upon a general and special demurrer to the opposition sustaining the special demurrer only to part of the specifications cannot affect the result, whether such ruling be regarded as overruling the general demurrer to the opposition or as failing to pass upon it; as in either case the order dismissing the opposition and granting the discharge, when sufficient specifications were unanswered, is erroneous.

APPEAL from orders of the Superior Court of Santa Clara County dismissing the opposition of a creditor to the discharge of an insolvent debtor and granting such discharge. A. S. Kittredge, Judge.

The facts are stated in the opinion of the court.

Francis E. Spencer, and D. W. Burchard, for Appellant.

S. F. Leib, for Respondent.

HARRISON, J.—Jacob Rich was adjudicated an insolvent by the superior court of Santa Clara county June 4,

1896, and in due time thereafter filed his petition to be discharged from his debts. The Santa Clara Valley Mill and Lumber Company, a corporation, is one of the creditors of said insolvent, and for the purpose of opposing his discharge filed certain specifications—twelve in number—of the grounds of its opposition, in each of which it set forth facts upon which it claimed that the petition should be denied. Upon the motion of the insolvent the court struck out two of these specifications and a portion of another, upon the ground that they were irrelevant. The insolvent also filed a demurrer to the opposition upon the ground that it did not state facts sufficient to prevent him from being entitled to his discharge, and in his demurrer he also pointed out and specified portions of three of the specifications which he claimed were ambiguous and uncertain, and demurred to them upon those grounds. After hearing argument upon the demurrer, the court ordered that the demurrer “be sustained only upon the grounds mentioned in paragraphs 4 to 12, both inclusive, of said demurrer,” and giving to the creditor leave to amend, if it so desired. The paragraphs of the demurrer referred to in the order are those in which certain averments contained in the specifications of opposition, numbered 5, 6, and 10, are demurred to upon the ground of ambiguity and uncertainty. The court made no order with reference to the paragraphs of the demurrer which refer to the entire opposition. No amendment having been filed by the creditor, the court, upon the motion of the insolvent, made an *ex parte* dismissing the opposition, and thereafter made an order discharging the insolvent from his debts. From these orders the creditor has appealed.

Section 53 of the Insolvent Act (Stats. 1895, p. 148) enumerates various grounds for refusing a discharge of the insolvent from his debts, and section 54 provides the mode in which these grounds, or any one of them, may be brought to the attention of the court by declaring that “any creditor opposing the discharge of a debtor shall file specifications in writing of the grounds of his opposition; and after the debtor has filed and served his answer thereto, which pleadings shall be verified, the court shall try the issue or issues raised, with or without a jury, according to the practice provided by law in civil actions.”

In the present case the appellant filed twelve different speci-

fications of the grounds of its opposition to the discharge of the insolvent, each of which, if undisputed, or if denied by the verified answer of the insolvent, should be determined by the court to exist, deprived him of a right to his discharge. Two of these specifications and a portion of a third were struck out by the court as irrelevant, and portions of the others were held to be subject to demurrer for ambiguity and uncertainty. Six of the specifications were not answered by the insolvent, nor did the court make any order by which he was freed from the necessity of answering them. The facts stated in either of these are such as to deprive the insolvent of his right to a discharge, and the court had no authority to grant his discharge until after he had filed his verified answer thereto, and it had been determined that these grounds of opposition did not exist.

The contention of the respondent that the order of the court upon his demurrer to the creditor's opposition is to be regarded as would be an order sustaining a demurrer upon one of several grounds to the sufficiency of a complaint is untenable. The "specifications" of the opposition authorized by section 54, and which were made in the present case, are in the nature of separate defenses to the application for a discharge, and each is to be considered and determined independently of the others. The irrelevancy of one specification, or an ambiguity of statement sufficient to authorize it to be disregarded, cannot be invoked to impair the effect of another specification which in itself is sufficient to defeat his application. If the whole of specifications 5, 6, and 10, in which are contained the portions held by the court in its order upon the demurrer to be ambiguous and uncertain, are disregarded or struck out of the opposition, the specifications setting forth his refusal to deliver to the assignee his books of account, and his concealment thereof—his fraudulent preference of certain creditors—his concealment of a portion of his estate, and his admission of certain false and fictitious claims against his estate, still remain and are sufficient to deprive him of the right to a discharge.

This result is not affected by the form in which the court made its order upon the demurrer. The first portion of the order, wherein it purports to sustain the demurrer to the opposition, is qualified by the clause immediately following,

in which it declares that it sustains it only upon certain grounds. By its declaration that the demurrer is sustained only upon the grounds mentioned in certain paragraphs thereof, the court in plain terms declined to sustain that portion of the demurrer which is directed to the opposition as an entirety, and limited its action to those grounds of the demurrer which refer to only three of the specifications. Whether this omission is to be regarded as equivalent to overruling the demurrer in these respects or as leaving it still undetermined is immaterial, as each of the specifications of the opposition is a distinct ground for denying the application. Those to which the demurrer is not sustained, or to which the order upon the demurrer was not directed, remain upon the record to be answered by the insolvent before the court can act upon his application for a discharge.

The orders appealed from are reversed.

Garoutte, J., and Van Dyke, J., concurred.

[Crim. No. 453. In Bank.—August 13, 1900.]

**THE PEOPLE, Respondent, v. ALBERT FREDERICK
GEORGE VERENESNECKOCKOCKHOFF, Appel-
lant.**

CRIMINAL LAW—HOMICIDE—PROPER INSTRUCTIONS AS TO MOTIVE.—Upon the trial of a defendant accused of murder, it is proper to instruct the jury that motive is not the ultimate fact to be proved; and that, if the crime is sufficiently proved, it does not matter whether there is a motive or not; but that, in a case depending upon circumstantial evidence, the presence or absence of motive is matter of corroboration, and makes other evidence more or less persuasive, and diminishes or increases the presumption of innocence.

ID.—IMPROPER INSTRUCTIONS AS TO MOTIVE—PROBATIVE FORCE OF EVIDENCE—CHARGE UPON MATTER OF FACT.—An instruction requested by the defendant that "it is against all experience and reason to suppose that a man will imperil his own life and inflict upon another a brutal crime without a motive, and in the mere wantonness of depravity," involves no rule of law, but is only as to the probative force of evidence, and is properly refused. A charge given by the court that "it may be impossible to show or establish a motive, for the reason that we cannot fathom the mind of the accused

on trial, and ascertain if there is not a hidden desire of vengeance or some passion to be gratified," is an argument against the defendant on the facts, and is an improper charge as to a matter of fact.

ID.—CONSTRUCTION OF CONSTITUTION—PROVINCE OF COURT AND JURY.—

Section 19 of article III of the constitution, providing that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law," refers to the province of the jury to determine all matters of fact, and of the court to determine the law, and forbids either the judge or the jury to trespass upon the province of the other. The court must not charge or advise with respect to matters of fact, and its power to state the testimony is exclusive of any other power of the court in its charge in respect to the evidence; and the prohibition upon it is coextensive with the exclusive province of the jury.

ID.—RELATIVE FORCE OF DIRECT AND CIRCUMSTANTIAL EVIDENCE—INSTRUCTION AS TO MATTER OF FACT.—The law declares nothing as to the relative probative force of direct and circumstantial evidence; and it is wholly matter for the jury to determine, according to their convictions, from the evidence. An instruction to the jury that circumstantial evidence is not entitled to a less degree of credit than direct evidence, and that circumstances are not likely to be fabricated, is an instruction as to matter of fact within the prohibition of the constitution. [McFarland, J., Garoutte, J., and Van Dyke, J., dissenting.]

ID.—CASES OVERRULED.—*People v. Oronin*, 34 Cal. 191, and cases affirming the doctrine of that case as to the relative weight of direct and circumstantial evidence, overruled. [McFarland, J., Garoutte, J., and Van Dyke, J., dissenting.]

ID.—INAPPLICABLE DECISIONS AS TO WEIGHT OF CIRCUMSTANTIAL EVIDENCE.—The decisions made by the courts of other states in relation to the relative weight of direct and circumstantial evidence, where the trial judges were free from any constitutional or statutory restrictions upon their power to sum up the evidence, are inapplicable under our constitution.

ID.—EFFECT OF PRIOR DECISIONS—CONSTRUCTION OF CONSTITUTION—POWER OF JUDGES TO CRITICISE EVIDENCE.—Though it is conceded to be a proper rule of construction that the words of our constitution are to be construed in the same sense that had been previously fastened upon similar language by the decisions of other states, yet there are no authoritative decisions of other states which have fastened upon the language of our constitution the construction that judges may, in their charges to juries, criticise the weight and credibility of evidence.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Carroll Cook, Judge.

The facts are stated in the opinion of the court, per Temple, J., upon the first hearing in Bank.

W. H. Schooler, and R. L. Simpson, for Appellant.

F. W. Sawyer, *Amicus Curiae*, also for Appellant.

W. F. Fitzgerald, former Attorney General, W. H. Anderson, former Assistant Attorney General, Tirey L. Ford, Attorney General, C. N. Post, Assistant Attorney General, A. A. Moore, Deputy Attorney General, D. J. Murphy, District Attorney of San Francisco, and Henry A. Melvin, Assistant District Attorney of Alameda County, for Respondent.

BEATTY, C. J.—When this cause was originally submitted for decision the only answer to the objections of appellant to the charge of the trial judge was a reference to Durrant's case. (*People v. Durrant*, 116 Cal. 222.) In the opinion of Justice Temple it was shown that Durrant's case was not authority on the point here involved. In his petition for a rehearing the attorney general then cited as authority against the conclusions of the court the charge of Chief Justice Shaw in the Webster case, and various decisions of the courts of New York and other states, sustaining similar charges. Before the oral argument on rehearing the attention of counsel was called to the fact that in all those cases the trial judges were entirely free from any constitutional or statutory restriction upon their power to sum up the evidence, and, consequently, that the opinions and practices of Chief Justice Shaw, Chief Justice Gibson, and other American judges in such cases, is no more authority in cases arising under the constitution of California than would be a charge approved or delivered by Lord Hale.

In response to this suggestion counsel for the people cited, at the oral argument a number of decisions by the courts of our sister states, which they contend have given to constitutional provisions similar to our own a stricter and narrower construction than that upon which Justice Temple's opinion was based.

And it is contended that some of these cases having been adopted before the adoption of our first constitution in 1849, and others before the adoption in 1879 of our present consti-

tution, we are bound by a familiar rule of construction to hold that the words of our constitution were adopted in the sense which had been attributed to them in those decisions. I admit the validity of this rule of construction, but on examination of the decisions referred to find no grounds for its application in this case. The supreme court of Tennessee, at its July term, 1843, decided the case of *Ivey v. Hodges*, 4 Humph. 154. That was a civil case, and the only question to be decided was whether the trial court had erred in refusing to restate the evidence to the jury at the conclusion of the trial. In considering this question the writer of the opinion quoted the provision of their constitution that: "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law," and thereupon proceeded to observe that: "This provision arose out of the jealousy with which our ancestors always looked upon any attempt on the part of the courts to interfere with the peculiar province of the jury, the right to determine what facts are found in a cause, and to put a stop to the practice of summing up as it was and is yet practiced in the courts of Great Britain, and in all probability in the colonies before the Revolution, and which consists in telling the jury not what was deposed to, but what was proved. This the framers of our constitution considered a dangerous infraction of the trial by jury, and have prohibited it in express terms: Judges shall not charge with respect to matters of fact—that is, shall not state to the jury what facts are proved." This is the case upon which most reliance is placed by counsel for the people, and they contend that it settled the construction of the Tennessee constitution to the effect that judges are merely prohibited from stating to the jury what facts are proved, leaving them entirely free to comment upon and criticise the evidence, its weight and credibility. It will be seen, however, that this is not even a necessary implication from what was remarked *obiter* in respect to a matter only incidentally related to the question to be decided. The court was not called upon to decide, and the case before them did not admit of a decision, as to the full scope of the clause prohibiting a charge as to matters of fact. They merely remarked in passing that it prohibited a charge as to the facts proven—a statement which was, and was no doubt designed

to be, quite within the truth, and by no means exclusive. We shall see when we come to examine the decisions of this court that it has been expressly held here in some cases, and implied in many more, that the corresponding clause of our constitution means a great deal more than to prohibit a statement of what has been proved.

Another Tennessee case is *Ayres v. Moulton*, 5 Cold, 154, in which a judgment was reversed because the trial judge told the jury that "from the facts as proven" the plaintiff was entitled to recover. Of course, this decision was correct, but it does not follow that the judgment would not equally have been reversed if the trial judge had merely told the jury that the evidence for plaintiff was entitled to great weight because of a character not likely to be fabricated.

These two are the only cases called to our attention which were decided before the adoption of the constitution of 1849, and manifestly they did not so construe the clause in the Tennessee constitution as to compel us to hold that in copying it the people of California only meant that judges should abstain from telling juries what facts had been proved. In Arkansas the case of *Harris v. State*, 34 Ark. 469, was decided in 1879. In that case the court was ruling upon an exception by the defendant to the giving of any charge by the court after the close of the argument. This was the only point to be decided, and the court in passing upon it, after quoting a provision of their constitution similar to our own, proceeded to observe: "Judges may not now, as under the former practice, in charging juries, sum up the evidence and tell them what facts are proven and what are not, and leave them to find such facts only as the court may deem disputed or doubtful, but it is the province of the court to declare the law applicable to the case, and the court is not obliged to be silent after the close of the argument." Here the decision of the court is completely covered by the last clause of the quotation. What precedes is dictum—as in the Tennessee case—true, as far as it goes, but by no means the whole truth.

In South Carolina a similar constitutional provision has been construed and applied in cases too numerous to be reviewed in detail here. The very number of these cases—about sixty—suggests a conclusion which is verified by a

judges shall not charge juries with respect to matters of fact. 'To weigh the evidence and find the facts is in this state the exclusive province of the jury, and with the performance of that duty the judge cannot interfere without a palpable violation of the organic law.' (*People v. Dick*, 34 Cal. 666.)"

It is not necessary to multiply citations upon this point, or to refer to the numerous cases in which the same dictum has been assumed without express statement. It may, however, be proper to refer again to Cronin's case. (*People v. Cronin*, 34 Cal. 191.) In Justice Temple's opinion he has pointed out the apparent oversight of Judge Sanderson in founding his conclusions upon the practice of the United States courts, and ignoring the special provision of our constitution. I have only to add that the decision in Cronin's case, while it remains unquestioned authority upon the point mainly considered, viz., the sufficiency of the indictment, has been very seriously questioned and vigorously criticised on every other point. (See 2 Notes on California Reports, 748.) As to one of the instructions it was in effect overruled in *People v. Padillia*, 42 Cal. 540, and as to another, the comment upon the defendant's position as a witness, it has been reluctantly followed in this state with continual protest; while in the state of Nevada, after being followed for a time, it was finally repudiated. In this connection I take occasion to notice the claim of counsel that in delivering the opinion of the court in *State v. Nelson*, 11 Nev. 334, and in concurring in the opinion of Chief Justice Hawley, in *State v. Rover*, 13 Nev. 24, I approved the opinion of Judge Sanderson in the Cronin case. It is true I sustained two instructions copied from that case, but those instructions were very different from the instructions under review. The jury was not there told that circumstantial evidence is not likely to be fabricated. If such an instruction had been under review I should have had for my guidance the very able opinion of Justice Garber, in *State v. Van Winkle*, 6 Nev. 340, in which an instruction infected with the same vice was elaborately considered and condemned as an infraction of the constitution.

With these observations upon the points urged upon the rehearing it is sufficient to say that upon mature consideration of the whole case we adhere to the conclusions announced

in the opinion of Justice Temple, and for the reasons there stated the judgment is reversed and the cause remanded for a new trial.

Harrison, J., Henshaw, J., and Temple, J., concurred.

McFarland, J., dissented.

GAROUTTE, J., dissenting.—I dissent. This cause is now returned to the superior court for a second trial upon the ground that the jury was wrongly instructed as to the law of circumstantial evidence. The instruction given to the jury upon this branch of the law was too long—too analytical. In a text-book treating of criminal law, and written for the edification of lawyers and judges, such a discussion would be most appropriate; but its material assistance to a jury as a lamp to guide their feet is most doubtful. It may be safely said that the ordinary jurymen listening to a charge of the court fails to grasp a long technical analysis of the principles upon which the law of circumstantial evidence is based. And, in view of the fact that jurors are not lawyers but men brought from other walks of life, a plain declaration of fundamental elementary principles bearing upon the various branches of the law involved in the case is far more satisfactory, for every legitimate reason, than an extended dissertation upon criminal law, however legally sound that dissertation may be.

Notwithstanding the foregoing suggestions, I see nothing in the instruction upon circumstantial evidence that justifies an order of this court calling for a second trial of the defendant. The parts of the instruction quoted in the majority opinion in substance have been given to juries in criminal cases in the past, and upon appeal to this court have stood the test when tried in the crucible of the law. (*People v. Cronin*, 34 Cal. 191; *People v. Morrow*, 60 Cal. 142; *People v. Urquidas*, 96 Cal. 241; *People v. Durrant*, 116 Cal. 179.) Those cases have declared the criminal law of this state too long to be now overthrown and cast aside without the gravest reasons. I think those reasons are totally lacking.

It is not a fair test of the legal soundness of an instruction to measure it by an isolated sentence taken therefrom. It should be taken as a whole, and as a whole its validity meas-

ured. Throughout this instruction the court is dealing with circumstantial evidence in general. It is said that in a proper case circumstantial evidence has all the force, dignity, and effect possessed by direct and positive evidence. This is true. It is good law. Under the decisions in this state it is axiomatic. The court was not referring to the particular circumstantial evidence in the case on trial. It was not referring to the defendant. It was dealing with the question in the abstract and declaring general principles, leaving it for the jury to test and weigh and measure the case before it by those principles. The law declares that circumstantial evidence, if it satisfies the minds of the jurors of defendant's guilt beyond a reasonable doubt, demands a verdict of guilty exactly the same as direct and positive evidence. I see no possible legal objection to the court so declaring to the jury. The reason why circumstantial evidence is recognized and admitted in courts of justice in criminal trials, is a matter not material for a juror to know in making up his verdict. The fact that it is his duty to act upon such evidence is sufficient. At the same time there is no substantial error in telling the jurors why that class of evidence is recognized and admitted in courts of justice. There certainly is no violation of the constitutional provision forbidding judges to charge jurors as to matters of fact found in such a charge. Neither can it be said that this character of declaration is argumentative against defendant's innocence. I believe the conclusion declared by the majority of the court is based upon reasoning too technical, too metaphysical. The law does not contemplate that the practical administration of justice should be defeated upon these grounds.

VAN DYKE, J.—I dissent, and concur in the main with what is said in the dissenting opinion of Mr. Justice Garoutte.

The following is the opinion of the court in Bank rendered by Mr. Justice Temple, upon the former hearing in Bank, August 1, 1899, approved in the foregoing opinion of the court upon rehearing:

TEMPLE, J.—The defendant was convicted of murder in the first degree, and judgment of death was pronounced upon

him. He appeals from the judgment without a bill of exceptions. The rulings complained of all relate to giving or refusing to give instructions.

The defendant asked the court to instruct the jury as to the probative force, to be found in the fact that, as was claimed, there was no apparent motive for the commission of the offense. The court was asked to say that: "It is against all experience and reason to suppose that a man will imperil his own life, and inflict upon another a brutal crime, without a motive and in the mere wantonness of depravity," and, further, when the question is as to whether defendant committed the crime, it is of great importance. The instruction was properly refused. It involved no rule of law, but only a question as to the probative force of certain evidence.

Instruction 3, asked by the defendant, was properly refused, for the reason given. It was unintelligible. I think counsel meant to ask an instruction to the effect that, if the circumstances were consistent with some theory under which defendant could be innocent, such theory should be preferred to an hypothesis equally consistent with the circumstances proven, but by which guilt would be established. But it is added, "unless the hypothesis of which the construction of guilt is based upon is proven beyond all reasonable doubt." Waiving the imperfect expression, I do not understand this in connection with what precedes it, and that leads me to doubt whether I have understood any part of it. I think it may be assumed that the jury could not have received enlightenment from it.

But while the court correctly declined to charge the jury at the request of the defendant as to the value and effect of the evidence, it proceeded to do the same thing of its own motion.

The attorney general suggests that the instruction cannot be reviewed, because the evidence has not been brought up and we cannot know that it could have been injurious. But even in the absence of a bill of exceptions we may presume that there was evidence of some character to which the instruction would apply; and where the giving of such instruction would be erroneous, as applied to all possible evidence to which it would be applicable, then error has been made out.

Here the court tells the jury that there are two main facts to be made out by the prosecution: 1. That a crime has been committed; and 2. That the defendant committed it, and then proceeds to discuss the importance of the proof of motive. It is recognized that motive is not the ultimate fact to be proven, but the proof or disproof of any motive or inducement to commit the crime is merely evidentiary in its character, but is an important consideration, especially in a case depending upon circumstantial evidence.

The only matter of law in all this is that the motive is not the ultimate fact to be proven, and, of course, it would follow from this that if the commission of the crime by the defendant be sufficiently proven it does not matter whether there appears to have been a motive or not. This is certainly true in this class of cases. The presence or absence of motive is matter of corroboration—or, rather, it makes other evidence more or less persuasive. It increases or diminishes the presumption of innocence, and in this case it could have had no other function. And this is recognized in the charge, which nevertheless proceeds to tell the jury how difficult it is to prove motive, and states that: "It may be in many cases impossible to show or establish a motive, for the reason that we cannot fathom the mind of the accused on trial and ascertain if there is not a hidden desire of vengeance or some passion to be gratified; besides, there is no rule of law which determines what is or what is not an adequate motive, even if it were necessary to show one."

Applying this to the case, the jury were told that although the prosecution might not be able to prove it the defendant may have had a "hidden desire of vengeance or some passion to be gratified." This was not the statement of a rule of law, but an argument against the defendant on the facts.

And the court proceeded at some length with this argument to the jury, claiming that it is often impossible for the prosecution to prove the motive, though one existed.

Now the court stated to the jury that one issue submitted to them was whether the criminal act was committed by the defendant, and it is assumed that the question of motive bears upon this. The defense doubtless argued that, in the absence of direct proof that the crime was committed by the defend-

ant, the absence of any apparent or imaginable inducement to the crime was a strong circumstance in his favor. The entire change on this subject had the effect, and no doubt was designed to have the effect, to diminish the force of this argument. Certainly, such was its natural effect, and if, as the charge correctly assumed, it is entirely evidentiary—a circumstance affecting the proof of the ultimate fact, that defendant committed the act—then it must be held to be a charge with respect to matters of fact and a violation of section 19, article VI, of the constitution.

In giving the charge the learned judge stated to the jury that the language of this part of the charge had been approved by the supreme court. The case alluded to is the case of *People v. Durrant*, 116 Cal. 179, where the charge was given. In that case it is stated in the opinion of the court that the appellant did not make serious complaint that any of the instructions were erroneous in point of law, but only that in some instances the propositions which he sought to have laid before the jury were not adequately presented. An examination of the record in the Durrant case shows that the point was not made nor argued that by giving the instructions the court invaded the province of the jury. As here, counsel sought to have the court charge in its favor on this point, and did not complain that it exceeded its power. The point would not have been noticed here but for the necessity of reversing the case for the giving of another instruction where an objection is made, and also to decide as soon as possible that such instructions should not be given.

Section 19, article VI, of the constitution reads as follows: "Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."

What are matters of fact referred to in this section? Undoubtedly, reference is made to the familiar proposition that it is the province of the jury to determine all matters of fact and for the court to declare the law. In this case the learned judge at some length defined the respective functions of the court and jury. The judge said: "It is my duty to state to you the law applicable to the case, and it is your duty, unaided by any suggestion from me, to pass upon all questions

of fact. Neither the judge nor jury may trespass upon the province of the other. Our provinces are entirely distinct and separate. You should receive the law as I state it to be, notwithstanding you should firmly believe I am wrong, and the law is, or should be otherwise. . . . With the questions of fact, the weight of the evidence, the credit you should give to any witness sworn in the case, the court has nothing to do. These are matters entirely with your province, and which you, as jurors, must determine for yourselves." This is correct and well expressed.

This distinction between the respective functions of the court and jury is an old one, and is plainly recognized in the constitutional provision above quoted. It was and is the practice in the English courts and in the federal courts, and also in many of the states, for the judges to charge the jury as to matters of fact, but it has always been understood that such charge was only in aid of the jury, but that they were not bound by it. The right of the court, however, to declare the law has always been deemed absolute.

A general verdict consists of both law and fact. The jury were bound to find the facts from the evidence which was submitted to them under the supervision of the court. Its competency and relevancy were for the court. But while formerly the court could aid the jury by discussing the evidence—that is, could consider it in its charge as to it—the function of the jury was supreme. The law the court must determine and declare, and the jury was bound absolutely by this determination. The verdict is the application of the law declared by the court to the facts so found.

In the constitutional provision this distinction is recognized. The court must not charge with respect to matters of fact, but may declare the law. If the negative word had been omitted, the use of the different terms would have been significant, and it would have been said that the charge was not as authoritative as the declaration. This adds much force to the inhibition. The court must not even charge—that is, advise—with respect to matters of fact. And this is further emphasized when the constitution proceeds to state affirmatively what the court can do in respect to the evidence. It may state the testimony, *expressio unis est exclusio alterius*.

The prohibition is plainly coextensive with the exclusive province of the jury. If there are rules of law to control and guide, then these may be declared authoritatively. Beyond this the court cannot go without violating this plain inhibition. The court cannot argue to the jury the relevant importance of evidence, except as that is settled by some rule of law. For instance, it is for the court to determine the admissibility of evidence, and evidence may be admitted for a limited purpose, and the jury may be limited in their consideration of it. Certain rules have become rules of law for the consideration of circumstantial evidence, and such rules were properly declared by the court in this case. Except so far as may be indicated by these rules there is no law or legal principle, that I am aware of, which determines the relative probative force of direct and circumstantial evidence.

These maxims or rules are all founded upon the fact that circumstantial differs from direct evidence in this, that circumstantial evidence tends to prove facts not in issue, but from which the fact in issue may be inferred. The special rules lay down the conditions which will warrant the inference. But the law declares nothing as to the relative probative force. Both are admitted, and the jury are required to render their verdict in accordance with their convictions. We all know that testimony may be unreliable, whether addressed directly to the fact in issue or to proof of circumstances, and that in some cases positive evidence has been overcome by circumstantial evidence. The case of an alibi may be of that character. In such cases it is often simply a question as to the veracity of two sets of witnesses. If both kinds are in the same case and they conflict, it is wholly for the jury to determine which is most convincing. In fact, I think circumstantial evidence is more often resorted to by the defense than by the people. Besides, the case of an alibi, circumstances are often shown by the defense tending to make probable the innocence of the accused, or which tend to raise doubts as to truthfulness of witnesses for the prosecution; but I have never known the court to deliver a long address to the jury in the interest of such defense to disabuse the minds of the jury of supposed prejudices against such evidence.

Now, why did the court in this case deliver a long charge to the jury as to the relative value of direct and circumstantial evidence? The reason is plainly stated. No one saw the act of killing, and the proof that defendant is the guilty party is entirely circumstantial. The court enlarged upon the necessity of a resort to such evidence in order to punish crime and to protect the community, and said: "Providence, the laws of nature, and the relation of things are so linked and combined together that a medium of proof is often furnished leading to conclusions as strong as those arising from direct testimony." And again: "Circumstantial evidence has this great advantage, that various circumstances from various sources are not likely to be fabricated." This is a possible case; was it so in this case? And, as instructions should be pertinent to the evidence, was it telling the jury that in this case there were various circumstances against the defendant derived from various sources which were not likely to be fabricated?

That circumstances are not likely to be fabricated may be the opinion of the learned judge, and it may be sound philosophy. It is not, however, a maxim of law, although it has often been said by learned judges, and, in my opinion, it is not generally true. The fact that the circumstances may be exceedingly various and comes from unexpected sources, and are generally in themselves trifling affairs that would not impress the minds of observers, makes them easy of fabrication and renders them difficult to disprove. A community excited by a great and mysterious crime is naturally eager to see the perpetrator punished; many of its members are soon found with theories and anxious to show their ability as detectives. The circumstances, when numerous, never constitute a chain in which each is a necessary link, but many may be disbelieved and yet the theory persist. In fact, generally there is no hypothesis or theory save that the defendant is guilty; and the case is an assemblage of suspicious circumstances which may all be true, and yet the defendant be innocent, but which prevail by mere number. The court told the jury that this species of evidence was not entitled to an inferior degree of credit, and to so convince the jury was evidently the purpose of this long charge. Whether it is entitled to such credit or not is a question in each case to be deter-

mined by the jury from the evidence. This charge was plainly an argument for the prosecution.

Instructions have undoubtedly been given, and have to some extent been sanctioned by this court, where the question of the limitation upon the right of the judge to charge the jury as to questions of fact was not raised. The case most often referred to as sanctioning discussions of this kind is *People v. Cronin*, 34 Cal. 191. A very able opinion was rendered by Chief Justice Sanderson, who entirely disregarded this provision of the constitution. Probably it was not called to his attention. He expressed the opinion that in reply to an argument of the defense as to the alleged danger of acting upon circumstantial evidence, "It was competent for the court to caution them against the alleged dangerous tendency of circumstantial evidence claimed by counsel to be demonstrated by these cases." That is, he could answer the argument of counsel for the defense as to the weight and value of evidence, and he gives as authority for the proposition the case of Tom Jones (2 Wheel. C. C. 461), in the circuit court of the United States, where there is no such restriction, showing plainly that the learned justice did not have this restriction in mind. He proceeds expressly to approve of the action of the judge in replying to the persistent attack of counsel for the defense on this class of evidence, directly and expressly declaring that the court may and should charge the jury as to facts, and going so far as to say that the court could properly single out a particular witness and charge the jury as to his credibility. But even Judge Sanderson did not say that as a general rule circumstantial evidence was as satisfactory proof of fact as positive evidence. He said, on the other hand, that in the nature of things it was not, but that in some cases it was as satisfactory and would produce the same degree of conviction, and might in particular instances be superior.

No one ever disputed this last proposition. A case may be completely made out by circumstantial evidence, and positive and direct testimony may be false. But is it proper under our constitution for the judge, in his charge to the jury, to answer the argument of counsel for the defense on the facts? Such it admittedly was in the Cronin case, which is the father

of the whole errant brood. The constitutional inhibition is too plain to admit of discussion, and such a charge is necessarily a charge with respect to matters of fact, if the domain of fact was correctly defined by the learned judge in his charge. That distinction is older than the courts of the United States, and, so far as I am aware, has never been criticised.

There are a few other cases in which the Cronin case has been blindly followed, all ignoring this constitutional inhibition.

The constitution is too plain to be disregarded on such authority. The cases do not attempt to construe the inhibition or to reconcile it with such instructions, and I think the attempt would necessarily have failed had it been made.

The judgment is reversed and a new trial ordered.

[S. F. No. 1667. Department Two.—August 14, 1900.]

DRURY MELONE, Respondent, v. KATE S. RUFFINO,
Executrix, etc., Appellant.

PLEADING—NEGATIVE ALLEGATION—NONPAYMENT OF DEBT—BURDEN OF PROOF—SUPPORT OF FINDING.—Negative allegations in a pleading need not be proved, unless they constitute an essential part of the original substantive cause of action. The allegation of nonpayment of a debt sued upon, though necessary to make the complaint perfect, need not be proved; but the burden of proof of payment is upon the defendant. Where the debt sued upon is proved within the statute of limitations, in the absence of proof of payment, a finding of the nonpayment alleged is sufficiently sustained.

AUTHORIZATION FOR SALE OF LAND—CERTAINTY OF DESCRIPTION—ABBREVIATIONS—REFERENCE TO ATTACHED DIAGRAM.—The use of abbreviations in the description of land contained in an authorization for its sale by real estate agents does not render the authorization void for uncertainty, where the abbreviations are intelligible and easily understood by the aid of a diagram attached to the document.

ID.—VARIANCE—DESCRIPTION IN INDORSED RECEIPT—UNDERSTANDING OF PARTIES—ACTION FOR RETURN OF DEPOSIT.—A variance between the description in the authorization and that contained in the printed receipt indorsed on the back thereof is not fatal, where

both refer to the attached diagram, and it is clear that all parties had reference to the same property. Where it was plainly agreed that if the title was not made good, the deposit made with the agents by the proposed purchaser should be returned to him, such variance will not affect an action to enforce the return of the deposit for failure of the owners to make the title good.

ID.—SALE AUTHORIZED BY ADMINISTRATOR—EVIDENCE—REPRESENTATIVE CAPACITY—HARMLESS ERROR.—Where a sale was authorized by an administrator to be negotiated by real estate agents, in an action by a proposed purchaser to recover back the money deposited by him with such agents, evidence is admissible for the defendant to show that he was acting in his representative capacity, and that all parties so understood the fact to be; but error in excluding such evidence is harmless, where it subsequently appears in proof that he acted in his capacity as administrator of the estate, and was endeavoring to dispose of some of its property for the benefit of himself and other heirs.

ID.—PERSONAL LIABILITY OF ADMINISTRATOR—DESCRIPTIO PERSONAE.—One who, in authorizing a sale of real estate, uses the first person in the body of the instrument, in fitting words to bind himself personally thereby, to which he appends his name, followed by the designation of himself as administrator of the estate of a deceased person named, is personally liable upon the contract, notwithstanding the description of his person and representative capacity so appended to his signature.

ID.—VALIDITY OF CONTRACT—LIABILITY FOR DEPOSIT.—There is nothing unlawful in an administrator binding himself personally by a contract to sell the property of the estate in good faith for the benefit of himself and other heirs; and though he may not be able to make a title by the decree of the court within the time limited, he may bind himself personally by a valid agreement for the return of the deposit made by his authority.

ID.—CREATION OF AGENCY—LIABILITY OF PRINCIPAL.—Where there was no provision in the written terms of the authorization to the real estate agents for a sale on their own account, or for compensation of any price obtained over a fixed sum, an agency is thereby created, and the principal is bound by the contract made by the agents under such authorization for a return of a deposit made by a proposed purchaser, in case of failure of the principal to make title, as agreed.

ID.—STATUTE OF LIMITATIONS—ACTION TO RECOVER DEPOSIT—WRITTEN CONTRACT.—The written contract being valid and personally binding upon the administrator, an action to recover the deposit agreed by its terms to be returned in case of failure to make title as agreed is not based upon an implied contract, nor affected by the two years' statute of limitations, and is not barred until the lapse of four years from the accrual of the cause of action.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

George C. Sargent, for Appellant.

O'Brien, O'Brien & O'Brien, and Andrew G. Maguire, for Respondent.

THE COURT.—Action on a contract, entered into by defendant's testator and plaintiff's assignor for the sale of land by the former to the latter, to recover the deposit made by plaintiff on account of the purchase. Plaintiff had judgment for the amount of deposit, to wit, nine hundred and twenty-two dollars and fifty cents, being ten per cent of the purchase price of the land, and also for interest thereon from June 10, 1893, amounting in all to twelve hundred and thirty-six dollars and eighty cents, and for costs. Defendant appeals from the judgment on bill of exceptions. The contracts, the subject of the action, reads as follows:

"San Francisco, May 19, 1892.

"I hereby authorize . . . Joost, Mertens & Company to sell . . . for me at any time within thirty days from the date hereof, and thereafter until this authority is revoked by me in writing, for the sum of nine thousand net dollars . . . or any less sum that I may accept for said property, that certain real property in the city and county of San Francisco [here follows description, 'being a portion of Mission Block No. 83']. And I further authorize and empower said Joost, Mertens & Company, in case of sale . . . to accept, as my agents, a deposit of ten per cent on the selling price as part payment thereof, and to execute to the purchaser, in my behalf and as my agents, a valid contract of sale of said property upon such reasonable terms as to examination of title and consummation of the sale as are equitable, usual, and customary, and as appear more particularly in their form of 'contract receipt' printed on the back hereof, which I hereby approve and ratify. I further agree to furnish free of charge, for examination of title, such abstract of the property as I

may have at the time the same is sold. This authorization is irrevocable during the term of this contract.

"L. J. RUFFINO,

"Administrator of the Estate of Petrona Ruffino, Deceased."

Pursuant to this authorization, Joost, Mertens & Co. made a sale to one Walker, plaintiff's assignor, and a deposit of ten per cent of the price named (nine thousand two hundred and twenty-five dollars) was made June 10, 1892, by plaintiff with Ruffino's said agents. A contract receipt in the form referred to in the authorization was signed as follows: "L. J. Ruffino *et al.* [Seal] By Joost, Mertens & Company, [Seal] Agents. W. D. Walker. [Seal]" This receipt recited that the deposit was on account of the purchase price of the property (describing it). "Fifteen days are allowed to examine title and consummate sale. At the termination of the aforesaid time the balance of said purchase money is due and payable upon tender of the deed of the property sold; if the title is found defective, the purchaser is to state his objections to their title in writing, and the seller is to perfect the title within thirty days after the expiration of the time first allowed for examination or any extension thereof, unless the title cannot to be perfected within said thirty days, in which event the same shall be perfected within a reasonable time thereafter. . . . If the sale is not consummated according to the foregoing conditions, the deposit is to be forfeited. . . . If the title cannot be perfected within the above-mentioned times, the deposit is to be returned. . . . The said W. D. Walker and L. J. Ruffino *et al.* hereby agree to comply with the conditions of this contract"; signed as above stated. L. J. Ruffino, at the time he signed the authorization, was administrator of the estate of Petrona C. de Ruffino, and so continued to be until June 27, 1895, when he died, leaving a will naming defendant as executrix thereof, and she duly qualified August 18, 1897; Petrona was the mother of L. J. Ruffino, and he and his sisters were heirs to her estate. Mr. Mertens, one of the firm of Joost, Mertens & Co., testified that L. J. signed the contract in his own office, in San Francisco, in the presence of Mertens, on the day of its date.

1. The court found that Ruffino had "failed . . . to return said deposit or any part thereof; and no part thereof has been repaid or paid to the said plaintiff or his assignor."

The complaint alleges failure and refusal by Ruffino "to return said deposit or any part thereof, although often requested so to do." The answer denies these allegations, and the finding of the court is challenged for insufficient evidence to support it.

It is not necessary to determine whether the evidence was sufficient to warrant the finding of nonpayment—if proof of nonpayment by plaintiff had been necessary. Where a plaintiff has proved the existence of a debt sued on—at least, within the period of statutory limitation—the burden of proving payment is on the defendant. That this is the rule at common law no one can doubt; and we have no statutory law changing it. Greenleaf states it as follows: "The defense of payment may be made under the general issue, in *assumpsit*; but, in an action for debt on a specialty or on a record, it must be specially pleaded. In either case the burden of proof is on the defendant, who must prove the payment of money, or something accepted in its stead, made to the plaintiff, or to some person authorized in his behalf to receive it." In Cowen & Hill's Notes to Phillips on Evidence, volume 1, side page 810, the authors, quoting from an authority and citing others, give the rule in this language: "The principle that he who alleges himself to be the creditor of another is obliged to prove the fact of agreement upon which his claim is founded, when it is contested; and that, on the other hand, when the obligation is proved, the debtor who alleges that he has discharged it is obliged to prove the payment, is clearly one of those propositions in which every system of jurisprudence must concur in general, whatever particular rules may be adopted, as to the mode and form of the allegations, by which the necessity of such proof is to be determined." The same rule has been recognized and declared frequently in this state. In *Caulfield v. Sanders*, 17 Cal. 569, the suit was upon an indebtedness alleged to be due from the defendant, who was an attorney at law. He averred in his answer that the principal part of the alleged indebtedness was due from his clients and not from him personally, and that the part for which he was personally liable had been paid. Field, C. J., delivering the opinion of the court, said: "This is in substance a denial of indebtedness for a portion of the

account, and a plea of payment for the balance. It is, in effect, an admission as to that balance of an original liability, and throws the burden of establishing the payment upon the defendant." Further on he says: "The issue thus formed cast upon the plaintiff the necessity of separating the different charges, and of establishing a liability as to those items which were incurred for clients of the defendant, and cast upon the defendant the necessity of proving a payment of the balance."

In *Lieman v. Early*, 15 Cal. 199, the suit was on a note, and the answer pleaded payment. As proof of his defense defendant offered in evidence some receipts from the plaintiff. Plaintiff offered rebutting evidence tending to show that these receipts were for payments on an open account, and not on the note. The defendant then proposed to show that there was no such account in existence, and to this offered evidence an objection by plaintiff was sustained. The appellate court reversed the judgment and said: "The burden of proof was really on the defendant to prove payment under the issue, and the defendants were entitled to close the proofs, at least, to rebut any new matter set up by the plaintiff." (Citing authorities.) In *Still v. Saunders*, 8 Cal. 281, the court said: "It appears that John W. Still was indebted to another person, and that it was agreed between him and defendant Saunders that the latter should pay this debt, and that this payment should constitute a portion of the purchase money. It lay upon the defendant to show when and how this debt was made."

Of course, it has been held by this court, as it was always held at common law, that in a complaint upon a promissory note, or other obligation to pay money, there must be an averment that the money had not been paid. This is necessary to make the complaint perfect upon its face. But it is a *non sequitur* to say that because such negative averment is necessary in the complaint therefore it is necessary for the plaintiff to prove it. The question is not one of pleading, but of evidence; not what must be alleged, but where the burden of proof lies. The general rule is that a party is not called upon to prove his negative averments, although they may be necessary to his pleading. See rules of pleading set forth and approved by Field, C. J., Baldwin J., concurring in *Green v. Palmer*, 15

Cal. 412¹, in which, among other things, it is said: "Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged and he must allege nothing affirmatively which he is not required to prove. Negative allegations, however, are frequently necessary, though they are not to be proved." A negative allegation is to be proved only where it constitutes a part of the original substantive cause of action upon which the plaintiff relies, and this is an exception to the general rule. As, for instance, in an action for malicious prosecution the plaintiff must both allege and prove want of probable cause, for the latter, although in the nature of a negative averment, is a necessary ingredient in the cause of action itself, and another instance is where the cause of action consists in the failure of the defendant to do certain work in a workmanlike manner; that the very gist of the cause of action is the allegation that the work, although done, was not done in a proper manner.

The cases cited from this court as tending to overthrow the common-law rule nearly all deal with a question of pleading, and not with a question of evidence. In two or three of them it is said that in a suit upon a promissory note the production of the note is sufficient proof of nonpayment; but this remark, no doubt, incidentally grew out of the fact that in a suit upon a negotiable promissory note the note itself must be produced, or its absence satisfactorily accounted for, in order to protect the defendant against such a wandering thing as a negotiable instrument. The only case that can be considered at all in point as establishing the opposite doctrine is that of *Farmers' etc. Bank v. Christensen*, 51 Cal. 571; but the language relied on occurs in a short opinion of less than a dozen lines, is fortified by no citation of authority, and is entirely *obiter dictum*. In that case the suit was upon a promissory note and mortgage. In the answer it was denied that any part of the note remained unpaid, and it was averred that it had been paid by a conveyance of the mortgaged land to the plaintiff. That being the condition of the case, the plaintiff moved for a judgment on the pleadings, and judgment was so entered. Of course, the judgment was properly reversed, because the answer raised

¹ 76 Am. Dec. 492.

issues upon which the defendant was entitled to introduce evidence. All that was involved in the case was disposed of in the last sentence of the opinion, which is as follows: "This denial and averment were sufficient to raise issues of fact, and the court below erred in rendering judgment for the plaintiff upon the pleadings." The statement in the former part of the short opinion that "this denial, of itself, cast the onus upon plaintiff to prove the nonpayment by production of the note or otherwise," was entirely outside of any questions legitimately before the court.

2. When the authorization and the contract receipt were offered in evidence defendant objected: 1. To the authorization, that it was void for uncertainty; that it does not describe any property, and by reason of the abbreviations used is unintelligible; 2. To the receipt, that it was not executed in the name of the person who gave the authority; that it described a different piece of property; that there was a substantial variance between the two; that the authority is a joint one and should have been executed by both partners, and that there is no proof of delivery. Upon the question of delivery we think the evidence was sufficient; it has in part already been stated.

As to the abbreviations used in the authorization we think them intelligible and their meaning readily understood. For example, the description reads: "Com at a pt on the W. line of Dolores st. dist 41 ft $2\frac{3}{4}$ in. from the N. line of 16th st. and run th in a W. direction 188 ft $2\frac{5}{8}$ in to a pt dist 28 ft $4\frac{7}{8}$ in. from the N. line of Dolores St. and run. th. at r. a. on the W. line," etc. Anyone familiar with land descriptions and abbreviations used in describing land would have no difficulty in supplying the terms intended by the abbreviations, especially so by the aid of the diagram attached to the document. As to the objection of uncertainty in the description of the land referred to in the authorization, and the alleged variance between the description therein and that in the receipt, there is some ground for the objection. It appears, however, that the contract and receipt were written upon a printed form used by Joost, Mertens & Co. and constituted one instrument, the receipt being printed on the back of the authorization, and its form approved in the body of the authorization. There was attached to the ~~re-~~

without authority." After stating this general principle the court adds: "If an agent in executing a contract employ terms which, in legal effect, charge himself, he may be sued upon the instrument itself as a contracting party. This is so because by the use of such terms he has made the contract his own." The opinion then proceeds to point out that from the terms employed the contract sued upon in that particular case "is manifestly the contract of the company and not the defendants. It is clear upon inspection of the instrument that the defendants intended to bind the company and not themselves, and that the plaintiff so understood it." *Hall v. Crandall*, *supra*, was followed in *Lander v. Castro*, *supra*, and *Blanchard v. Kaull*, *supra*, and for the reason that the notes sued upon did not purport to be the notes of the persons sued. And so in the cases cited from 77 California, *supra*, where it was held that "the defendants are not liable unless the contract contains apt words to charge them personally." The distinction between these cases and *Conner v. Clark*, *supra*, lies in the legal effect of the different terms used in the respective contracts. *Conner v. Clark*, *supra*, was not overruled by *Hall v. Crandall*, *supra*; on the contrary, the principle on which that case was decided is expressly recognized in *Hall v. Crandall*, *supra*.

5. Appellant claims that the authorization executed by Ruffino, even if personal, is void on its face and cannot be enforced. (Citing *Danielwitz v. Sheppard*, 62 Cal. 339; *Jones v. Hanna*, 81 Cal. 507.)

In each of these cases the action was by the agent to recover a commission on a contract forbidden by law, which if enforced would have resulted in a direct injury to the estate. The contract before us contains no such conditions. It is true that the administrator may not have been able to make a title by the decree of the court within the time stipulated, or at all, but there was nothing unlawful in his agreeing in good faith in his individual capacity to do so, nor was there anything unlawful in his receiving a deposit on the agreement. We are unable to see why Ruffino did not become personally liable for the deposit made by his authority. (*Maxon v. Jones*, 128 Cal. 77.)

6. Appellant claims that Joost, Mertens & Co. were the

vendors, and that the action should have been brought against them. (Citing *Robinson v. Easton, Eldridge & Co.*, 93 Cal. 80.⁶) In that case the plaintiffs signed a contract authorizing defendants to sell for plaintiffs certain real property. The contract contained the following clause: "And we will pay said Easton & Eldridge a commission of all over said sum of ten thousand dollars net, for which they may sell said property with our consent." A conditional sale was made by defendants and they received a deposit on account of the purchase, but, the conditions failing, they returned the money to the purchaser. Plaintiffs sued to recover this deposit on the theory that defendants received it as agents of plaintiffs, and that it was their money in defendants' hands the moment it was received. The court held that the relation of the agency was not created by the contract, but rather that of vendor and purchaser, and that the sale by defendants was on their own account. There was evidence in the present case that the clause in the authorization relating to the payment of commissions was erased, and, in lieu thereof, it was orally agreed between Joost, Mertens & Co. and Ruffino that the former "should have all they could get above nine thousand dollars." If this clause had been inserted in the contract, and this were an action by Ruffino's representative to recover the deposit from Joost, Mertens & Co., there would be some analogy in the cases. But this is an action brought to recover from Ruffino's representative on the theory that he received the money and did not return it when he failed to make the title.

7. The statute of limitations (Code Civ. Proc., sec. 339, subd. 1) is pleaded, and it is claimed that the action is barred by that section. This contention is upon the assumption that the contract was void and whatever liability attaches is upon an implied contract and was barred after two years. But as we have held that the liability arises on the contract, and not by implication, the claim is not barred. It is not now contended that it is barred by any other statute.

The judgment is affirmed.

Hearing in Bank denied.

⁶ 27 Am. St. Rep. 167.

[L. A. No. 699. Department Two.—August 16, 1900.]

C. A. STORKE, Appellant, v. EMIL GOUX, Auditor, etc.,
Respondent.

OFFICE—VACANCY—COMPENSATION OF APPOINTEE—INCREASE NOT ALLOWED DURING TERM.—The salary attached to a county or municipal office at the beginning of an official term must continue without increase during the entire term for which the officer was elected, notwithstanding the creation of a vacancy in the term, which is filled by the appointment of another.

ID.—CHANGE IN SALARY BEFORE APPOINTMENT—CONSTITUTIONAL LAW.—Notwithstanding the passage of a new county government act increasing the salary of a district attorney in counties of the same class, prior to the appointment of a district attorney to fill a vacancy caused by the death of the original incumbent, but subsequent to the beginning of the original term, the appointee is precluded by section 9 of article I of the constitution from availing himself of the increased salary.

APPEAL from a judgment of the Superior Court of Santa Barbara County. W. S. Day, Judge.

The facts are stated in the opinion of the court.

C. A. Storke, Appellant *in pro. per.*

Richards & Carrier, and E. W. Squier, District Attorney,
for Respondent.

HENSHAW, J.—This is an action in mandate to compel the auditor of the county of Santa Barbara to issue his warrant on the county treasurer of the county for the salary of petitioner as district attorney, at the rate of two hundred and eight dollars and thirty-three cents a month. The auditor declined to issue his warrant in that amount, but was willing to issue it for the sum of one hundred and twenty-five dollars per month, which he insisted was the salary of the office of district attorney for the time in question.

The undisputed facts are, that one Oglesby, at the general election held in November, 1894, had been elected to the office of district attorney of the county of Santa Barbara. He failed to qualify as such district attorney, and thereafter was

appointed to the office by the board of supervisors. After his pointment he qualified and acted as district attorney until February 25, 1898, when he died. Upon the first day of March following, this appellant was appointed by the board of supervisors to fill the vacancy caused by the death of Oglesby. During Oglesby's term it is conceded he was entitled to salary at the rate of one hundred and twenty-five dollars per month, and no more. (County Government Act of 1893; Stats. 1893, p. 450.) In 1897 a new county government act was enacted, which repealed the former act and provided for the compensation of district attorneys, in the class of counties to which Santa Barbara belonged, at the monthly rate which petitioner herein claims. (County Government Act 1897, sec. 179, subd. 8, secs. 232-34.)

The question thus presented is, whether the attempt of the petitioner to draw the increased salary for the unexpired term of Oglesby is violative of section 9 of article XI of the constitution, which provides that: "The compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office." This question upon principle is not to be distinguished from that decided in *Larew v. Newman*, 81 Cal. 588, where it was declared that under this article and section of the state constitution the increase of salary given in the general county government act does not accrue in favor of one appointed to fill a vacancy in an unexpired term of a county officer, and does not commence to run until the expiration of the term for which the incumbent had been elected, and that this result cannot be evaded either by the original incumbent resigning and procuring himself to be reappointed, or by his resigning and allowing some other person to be appointed in his place. Indeed, it is conceded by appellant here that the case of *Larew v. Newman*, *supra*, is authority against his contention, but he asks that that case be reconsidered and overruled. This we are not disposed to do. Upon reconsideration of it we are satisfied not only of the wisdom but of the soundness of the interpretation which it has given to the law.

The judgment appealed from is affirmed.

Temple, J., and McFarland, J., concurred.

[S. F. No. 2041. Department One.—August 20, 1900.]

CASPER J. GARDINER, Appellant, v. CALIFORNIA
GUARANTEE INVESTMENT COMPANY, Respondent.

**APPEAL—ONE UNDERTAKING UPON DISTINCT APPEALS—DISMISSAL—
WAIVER OF RIGHT—STIPULATIONS.**—Notwithstanding one undertaking upon two distinct appeals is so defective as to justify dismissal of both of them, yet the right to move to dismiss the appeal from the judgment will be deemed waived where the parties have mutually stipulated for extensions of time for the filing of points and authorities, and no objection was raised to the regularity or sufficiency of the appeal until after the points and authorities were filed, and until it was too late to take another appeal. But such waiver does not apply to a distinct appeal from an order made after judgment, the time of appeal from which had elapsed before any stipulations were made; and such appeal must be dismissed for want of a distinct undertaking thereupon.

MOTIONS in the Supreme Court to dismiss appeals from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a motion to vacate the judgment and to modify an order sustaining a demurrer to the amended complaint. George H. Bahrs, Judge.

The facts are stated in the opinion of the court.

George W. Monteith, for Appellant.

Joseph Hutchinson, for Respondent.

HARRISON, J.—Motion to dismiss the appeals. The appeals herein were taken June 24, 1899, and purport to be from a judgment dismissing the action, and also from an order made after judgment. The transcript on appeal was filed August 5, 1899. March 8, 1900, the respondent gave notice of the present motion to dismiss the appeals upon the ground that no sufficient undertaking on appeal had been filed. As there are two distinct appeals and only a single undertaking in the sum of three hundred dollars, the undertaking is defective within the rule given in *Centerville Co. v. Bachtold*, 79 Cal. 111, and many other cases. The motion is, however,

resisted by the appellant upon the ground that the defect has been waived by the conduct of the respondent. The facts upon which he relies as constituting such waiver are that after the transcript had been filed, viz., September 5, 1899, the respondent joined with the appellant in a written stipulation by which each party was to be allowed additional time within which to prepare and file his points and authorities on the appeal, and that the respondent again, on January 30, 1900, stipulated that the time for the appellant to file his points and authorities should be extended to and including February 3d; that on February 2d the appellant filed his points and authorities on the appeal herein; that on February 28th the respondent obtained the consent of the appellant to an order of this court therein extending time to file its points and authorities on the appeal herein until and including April 2, 1900, and that at neither of the dates at which these stipulations were made or asked, and at no time prior to the service of the present motion, did the respondent make any objection to the regularity or sufficiency of the appeal.

In view of these facts, we are of the opinion that the respondent must be deemed to have waived its right to object to a hearing of the appeal from the judgment. If it was its purpose to object thereto upon the ground presented in the present motion, it was but simple fairness to the appellant to notify him thereof, instead of uniting with him in a stipulation by which it, in effect, asked for and obtained from the appellant additional time within which to file its points and authorities. The judgment was entered April 8, 1899, and when the first stipulation was entered into the time for taking an appeal from the judgment had not expired, and if the objection had then been made the appellant could have taken a new appeal and filed a valid undertaking thereon. Respondent ought not to be permitted, by its conduct, to lure the appellant into a reliance upon the sufficiency of his appeal, and, after thus inducing him to undergo the labor and expense of preparing and filing his points and authorities, for the first time make the objection that he is not entitled to have them considered.

These principles, however, have no application to the appeal from the order. The order was made June 2, 1899, and at the date of the stipulation the time within which to appeal therefrom had expired. The appellant, therefore, cannot claim to have been misled in regard to the sufficiency of this appeal by any act or conduct of the respondent.

The appeal from the order is dismissed. The motion to dismiss the appeal from the judgment is denied.

Garoutte, J., and Van Dyke, J., concurred.

[Sac. No. 773. Department One.—August 20, 1900.]

J. A. SHEPHERD, Appellant, v. JAMES TURNER, Respondent.

APPEAL—REVIEW OF EVIDENCE—EXCLUDED EVIDENCE.—This court, in reviewing upon appeal the sufficiency of the evidence to sustain the findings of the court, cannot consider any excluded evidence.

ID.—ARGUMENT—SPECIFICATIONS OMITTED FROM BRIEF—ABANDONMENT. Specifications of the insufficiency of the evidence to support the findings, which are not argued in the appellant's brief, will be deemed abandoned.

ACTION FOR OBSTRUCTION OF HIGHWAY—EVIDENCE—PETITION AND PENCIL SLIP NOT PROVED.—In an action to remove the defendant's fence from an alleged public highway, a document purporting to be a petition for a county road, which bears no date, and is not shown to have been on file or in the custody of anyone, and to which is adhesively attached a slip in pencil containing a description of the proposed road, without any evidence, to show when it was attached or by whom it was written, is not admissible in evidence to show the formal laying out of the road.

ID.—RECORD OF SUPERVISORS—FAILURE OF PROOF.—A portion of the records of the board of supervisors appointing a petitioner to give notice to interested land holders to object to the laying out of a public road, and subsequently appointing viewers, and adopting their report, not shown to have been based upon any petition and proper proceedings appearing in the record, and not shown to have been made concerning the road in which the alleged obstruction exists, nor to be connected with the defendant or his grantors, is properly excluded as evidence relating to the formal laying out of the alleged road.

- 1D.—REPORT OF NOTICE OF ROAD—INADMISSIBLE EVIDENCE.—A written report to the supervisors stating that the signer had given notice of a county road, specifically described, to all persons living along the line, and that he found them all in favor of the road, which was not under oath, and did not appear to be a public record, and did not show that the defendant or his grantors lived along the line of the proposed road, is not admissible in evidence for any purpose.
- 1D.—REFUSAL OF BOARD TO VACATE ROAD—PROCEEDINGS INADMISSIBLE.—Proceedings of the board of supervisors upon a petition to vacate a public road, which included the premises upon which defendant had placed his fence, with which proceedings the defendant is not shown to have had any connection, have no tendency to prove the existence of a highway as against him, and are not admissible in evidence against him.
- 1D.—REPUTATION OF HIGHWAY—HEARSAY.—Evidence is not admissible for the purpose of showing that the alleged road was generally spoken of and regarded by the people in the neighborhood as a public road. Hearsay evidence is not admissible to prove the existence of a highway; nor can its existence be proved by showing that it was generally reputed to be a highway.
- 1D.—USE OF ROAD—DEDICATION—DECLARATIONS.—While it is competent to prove the use made of the road, and the extent of the use or travel over the road, for the purpose of showing a dedication or adverse user of the road under a claim of right, it is not competent to prove such user by the declarations of third parties.

APPEAL from a judgment of the Superior Court of San Joaquin County and from an order denying a new trial. Edward I. Jones, Judge.

The facts are stated in the opinion.

A. H. Ashley, District Attorney, and W. B. Nutter, for Appellant.

J. G. Swinnerton, for Respondent.

COOPER, C.—This action was brought by plaintiff as road commissioner, for the purpose of having abated as a public nuisance a fence erected and maintained by defendant upon an alleged public highway. The case was tried before the court without a jury, finding filed, and judgment entered in favor of defendant. This appeal is by plaintiff from the judgment and from an order denying his motion for a new

trial. There is no claim that the judgment is not the legal conclusion from the facts found.

There are many specifications in the statement of the insufficiency of the evidence to support certain of the findings, but as they are not argued in the appellant's brief they will be deemed abandoned. In fact, appellant, after stating that the land on which the fence is maintained belongs to defendant, subject to the public right of way, if any, says that the sole controversy in the case is as to the existence of the alleged public road at the place where the fence was erected. He then argues that there is a preponderance of evidence in his favor. But he says, "while appellant is aware of the rule that where the evidence is conflicting the appellate court will not disturb the decision, still it is believed that excluded evidence should certainly turn the scales in plaintiff's favor." We know of no rule that would authorize us in any way to consider "excluded evidence" in reviewing the sufficiency of the evidence as to a question of fact decided by the lower court. The only evidence we have any power to consider in such case is the evidence in the record, and not such as might be there. If the court rejects competent evidence, and proper exception is saved to the ruling, this court will review the ruling, and if prejudicial error appears reverse the case.

The appellant has argued certain alleged errors in the rejection of evidence which we will notice.

1. While the appellant was on the witness stand, he was shown a paper written in ink and addressed to the board of supervisors of San Joaquin county, as follows:

"Gentlemen: Your petitioners, inhabitants of San Joaquin county, would respectfully represent that the public convenience and want require that a county road should be laid out and constructed, beginning at Bonsell's Ferry on the San Joaquin river, running across the plains due east about twelve miles, intersecting the road leading from Stockton to Mariposa at what is called the Zink House. Your petitioners therefore pray your honors to consider and confirm the above road, and as in duty we will ever pray."

This was followed by several names, and indorsed on the back, "No. 89, Wagner Shepherd et al. Petition for county

road, Geo. H. Shepherd, appointed to give the notice to land holders as required by law, and make objection, if any, at the next May term." To this written paper was attached by some adhesive chemical a slip in pencil reading as follows: "Township line between T. 1 and 2 south, range 6 east. Commencing from where the road from French Camp to Bonsell's Ferry intersects the S. boundary of township 1 south, range 6 east, and running thence to Zink House."

The appellant, in answer to questions, said that he had seen the written paper before, and that the signature "J. A. Shepherd" was his signature. The appellant, in answer to questions as to the pencil slip, said: "I don't recollect about that pencil slip. I don't think I know the handwriting. I don't know when it was attached. If I did know anything about it I have forgotten."

The appellant then offered in evidence the paper written in ink and the slip written in pencil attached together as "plaintiff's exhibit 1." The defendant objected upon the ground that it was irrelevant, incompetent, and immaterial, and that the pencil slip was not shown to be any part of the petition. The court sustained the objection so far as it relates to the first cause of action stated in the complaint—the formal laying out of the alleged road by the board of supervisors—and admitted it for all other purposes. This ruling is now claimed to be error, and much space in appellant's brief is devoted to this assignment.

We think the ruling correct. In fact, we cannot see from the record that the paper was admissible for any purpose. It does not appear to have any date, nor to have been on file nor in the custody of anyone. The paper and the pencil slip were offered in evidence together, and there is nothing to show when the pencil slip was attached to the writing nor in whose handwriting it was. So far as the record shows, the paper may have all been written the very day it was offered in evidence.

2. Appellant offered in evidence a portion of the records of the board of supervisors found in "Book A," dated February 4, 1858, which reads as follows:

"In the Matter of the Petition of Wagner, Shepherd and Others for a County Road.

"On this day the matter of the petition of Wagner, Shepherd, and others, praying for a county road to be laid out, came on to be heard. Whereupon Geo. H. Shepherd was appointed by the board to give notice to land holders interested therein, as required by law, to make their objections, if any they can, to this board, at the May term thereof and show cause why the prayer of said petitioners should not be granted."

The court sustained the objection of defendant to this record so far as it related to the formal laying out of the alleged road, and this ruling is urged as error No. 2. The ruling does not appear to be erroneous from the record before us. It does not appear that the order was made concerning the road on which the alleged obstruction exists. The order is not based upon any petition or prior proceedings appearing in the record. Neither is there anything in the record connecting defendant or his grantors with the order.

3. The appellant offered in evidence a written paper purporting to be signed by "Geo. H. Shepherd," and addressed to the board of supervisors. This paper stated that Shepherd had given "notice of a county road commencing at Bonsell's Ferry road where it crosses the township line between sections one and two south, in range 6 east, about one mile and a half from said ferry, and thence running along the said township line due east about two miles, intersecting the French Camp road near the Zink House, to all persons living along the line, and that he found them all in favor of the road." The defendant's objection to this paper was properly sustained. It did not appear to be a public record, and was not evidence for any purpose. It was a written statement, not even made under oath, and did not show or tend to show that defendant or any grantor of his was one of the parties living along the line of said proposed road. There was no error in the ruling of the court as to other portions of the record of the board of supervisors relating to appointment of viewers, their report and the order adopting their report. The records of the board could only be admissible in connection with a proper petition and proper proceedings for the purpose of laying out and erecting a highway, including in its description the point where the defendant maintains the alleged

fence. There being no evidence in the record as to any such petition or prior proceedings, the portions of the record offered were incompetent and immaterial. In all cases where private property is sought to be taken for a public use under statutory proceedings it is essential to show a substantial compliance with the necessary steps enumerated in the statute.

4. The appellant offered in evidence a petition to the board of supervisors, an order appointing viewers upon the petition, a bond, the report of viewers and an order of the board of supervisors, all made and occurring in 1880, for the purpose of showing the refusal of the board of supervisors to vacate a public road, which it is claimed included the premises upon which defendant has placed the fence.

The court properly sustained defendant's objections to the several offers. The fact that the board of supervisors refused to vacate a highway did not and could not tend to make the premises a highway. It would be a strange, and we apprehend an unheard of, doctrine to allow a record refusing to vacate a highway to be admitted as proof of such highway. It might be, if the defendant had signed any paper, or if he had done any act tending to show that he recognized the public claim to the highway, that such act would be evidence against him, but to allow an order made in his absence and without his knowledge to be introduced in evidence against him - would be to introduce a new principle into the rules of evidence.

5. The appellant asked several questions of the witness Shepherd while on the stand for the purpose of showing that the road was generally spoken of by the public as a public highway. Among the questions asked were the following:

"Q. Did you hear it talked of by the people in the neighborhood about the road?"

"Q. And is it not a fact that the traveling public passing your ferry regarded and treated that road throughout as a public road?"

To these questions and others of a like nature the court sustained objections, and we think the rulings correct. While it was competent to prove the use made of the road and the extent of the use, for the purpose of showing that it had become a public way by dedication, or adverse user under a

claim of right, it was not competent to prove such user by the declarations of third parties. Neither was hearsay evidence admissible to prove such fact. A public highway cannot be proven by showing that it was generally reputed to be a highway. The court admitted all evidence as to acts done by parties in the neighborhood in the way of using the road, and all evidence tending to show the extent of the travel over the road by the public.

It is not necessary to notice in detail the other alleged errors. We have discussed such as appear to be the most seriously urged, and as to the others we have examined them and find no error sufficient to justify a reversal of the case.

The judgment and order should be affirmed.

Gray, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

Hearing in Bank denied.

[L. A. No. 534. In Bank.—August 20, 1900.]

W. H. WORKMAN et al., Appellants, v. SOUTHERN PACIFIC RAILROAD COMPANY, Respondent.

MUNICIPAL ORDINANCE—STREET FRANCHISE FOR RAILROAD—SINGLE OR DOUBLE TRACK—ELECTION—CONTINUED RIGHT—CONSTRUCTION OF ORDINANCE WITH STATUTE.—A municipal ordinance granting the right of way to a railroad company over one of its streets, and requiring it to construct its track or tracks as near the center of the street as may be, is to be construed in connection with the statute under which the railroad company is incorporated, as providing for such use of the street, and for such single or double track as is authorized by the statute. In the absence of any express limitation in the ordinance requiring the immediate election of the use of a single or double track by the railroad company, the city council must be deemed to have granted the right of way with the privilege to the company to construct a single track at the outset, and the continued right to construct an additional track in

the future, whenever it should become desirable from the necessities or convenience of operating its road.

• **ID.—DETERMINATION OF NECESSITY—CONSTRUCTION OF STATUTE.**—Under a statute empowering the governing body of a city to grant “the use of any of the streets or highways which may be absolutely necessary in order to enable any such company to reach an accessible point for a depot in any such . . . city, . . . or to pass through same along as direct a route as possible and accommodate the traveling and commercial interests thereof,” the city council is not required to determine in the first instance what use of the street is “absolutely necessary” for the company. The statute does not require the use to be designated in the ordinance; but it is sufficient to designate the street to be used, and it may be properly left to the determination of the railroad company what use thereof will be necessary for its business, which can only be determined as time and experience shall demonstrate.

ID.—ORDINANCE NOT A REVOCABLE LICENSE.—An ordinance granting the right of way over a street to a railroad company, which contains no limitation of time for the completion of a double track, is not to be construed as a revocable license for such completion, on the ground that a single track was first completed and used under the ordinance.

ID.—IMMATERIAL FINDING—TITLE TO STREET IN FEE—APPELLANTS NOT INJURED.—Where the city, which has appealed, is bound by the terms of its ordinance to allow a double track to be constructed upon its street, and the double track is constructed upon the opposite side of the street to that claimed in fee by a private party appellant, it is immaterial to either of the appellants whether a finding that the appellants have no title or interest in the land within the lines of the street is or is not sustained by the evidence.

APPEAL from a judgment of the Superior Court of Los Angeles County. Walter Van Dyke, Judge.

The facts are stated in the opinion of the court.

W. E. Dunn, City Attorney of Los Angeles, Walter F. Haas, Successor, T. E. Gibbon, and William J. Hunsaker, for Appellants.

The railroad company exhausted its power by the original location of its road, under the grant of the ordinance expressly reserving all the residue of the street for other uses. (*Rush v. Jackson*, 24 Cal. 308, 316; *Welsh v. Plumas County*,

94 Cal. 368; Pierce on Railroads, 254, and cases cited; *Morris etc. R. R. Co. v. Central R. R. Co. etc.*, 31 N. J. L. 205; *Moorehead v. Little Miami R. R. Co.*, 17 Ohio, 340-49.) Public grants and ordinances are to be construed most favorably to the public. (*Jackson Co. etc. R. R. Co. v. Interstate Rapid Transit Co.*, 24 Fed. Rep. 306-08; *Bartram v. Central Tp. Co.*, 25 Cal. 283; *Cullen v. Sprigg*, 83 Cal. 62; *Oakland v. Oakland Water Front Co.*, 118 Cal. 160; *Louisville etc. R. R. Co. v. Kentucky*, 161 U. S. 677-79; Thompson on Corporations, sec. 5345; Sutherland on Statutory Construction, sec. 378.) A privilege donated by ordinance which is not accepted or acted upon is not a vested right, but a revocable license. (Elliott on Railroads, sec. 69; *Philadelphia etc. Ry. Co.'s Appeal*, 102 Pa. St. 123; *Atchison etc. Ry. Co. v. Nave*, 38 Kan. 744¹; *Great Cent. Ry. Co. v. Gulf Ry. Co.*, 63 Tex. 529; *San Francisco v. Calderwood*, 31 Cal. 585²; *San Pedro v. Southern Pac. R. R. Co.* 101 Cal. 333, 336; *Potter v. Mercer*, 53 Cal. 667; *Chicago City Ry. Co. v. People*, 73 Ill. 541; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641³; *Blaisdell v. Portsmouth etc. R. R. Co.*, 51 N. H. 483; *Wilmington etc. Ry. Co. v. Battle*, 66 N. C. 540.) Under the statute of 1861, the common council must determine what use of the street is necessary, and cannot delegate their power to the railroad company. (*Cape May etc. R. R. Co. v. Cape May*, 58 N. J. L. 565; *Citizens' Street Ry. Co. v. Jones*, 34 Fed. Rep. 577, 581; *Richardson v. Heydenfeldt*, 46 Cal. 68, 70; *Oakland v. Carpentier*, 13 Cal. 540, 546; *Davis v. King*, 66 Conn. 465⁴; *Concord v. Concord Horse R. R. Co.*, 65 N. H. 34; *Scolly v. County of Butte*, 67 Cal. 249; *Holley v. County of Orange*, 106 Cal. 420, 424; *House v. Los Angeles Co.*, 104 Cal. 77, 79.)

Bicknell, Gibson & Trask, and James A. Gibson, for Respondent.

The ordinance is to be construed as allowing the construction of a single track, and of a double track thereafter, when the demands of business require it. (*Philadelphia etc. R. R. Co. v. Williams*, 54 Pa. St. 107; *Commonwealth v. Hartford R. R. Co.*, 14 Gray 379; 1 Rorer on Railroads, 297, 489,

¹ 5 Am. St. Rep. 800.

² 91 Am. Dec. 542.

³ 21 Am. St. Rep. 764.

⁴ 50 Am. St. Rep. 118, note.

505; *Hestonville R. R. Co. v. Philadelphia*, 89 Pa. St. 210, 218; *Ransom v. Citizens' Ry. Co.*, 104 Mo. 375; *Arcata v. Arcata etc. R. R. Co.*, 92 Cal. 639; *San Pedro v. Southern Pac. R. R. Co.*, 101 Cal. 333; *Citizens' Street Ry. Co. v. Memphis*, 53 Fed. Rep. 715; *Central Branch etc. R. R. Co. v. Atchison etc R. R. Co.*, 26 Kan. 669, 675.)

HARRISON, J.—In September, 1872, the city of Los Angeles passed an ordinance granting to the Southern Pacific Railroad Company a right of way along Alameda street in said city in the following terms:

"The mayor and common council of the city of Los Angeles do ordain as follows:

"Section 1. That the right of way for the railroad track of the Southern Pacific Railroad Company in and out of the city of Los Angeles for the distance said company may wish to use the same be and the same is hereby granted to said company, its successors, and assigns, over and upon the street and its extension commonly called Alameda street. The said company to locate its track or tracks as near the center of the street as may be; and the residue of said street to be held and used by said city for the passage of persons and vehicles on each side of the same; provided that said city expressly reserves the right to locate cross-streets over and across any part of Alameda street and railroad track as the future improvements and convenience of the city may require; and the railroad company, in consideration of said right of way, agree to provide and keep in repair convenient crossings over their track or tracks at the crossing of such streets now in use or which may be hereafter located by said city. And provided, further, that said city reserves the right to construct and pass under said track any water canal or zanja or water ditch, at the expense of said city, its successors or assigns, which may become necessary for the use of the inhabitants of said city. The said railroad company, its successors and assigns, to correspond the track of said road to the required grade of water canals, zanjias, or ditches now in use; and provided, further, that said railroad track or tracks shall correspond to the official grade of said street."

Very soon thereafter the railroad company laid down and constructed a single track along said street which it has since

continued to use in the operation of its road and business. In 1893 it laid a double track on the portion of said street north of Commercial street, and was proceeding to extend this double track along Alameda street from Commercial to Fourth streets, when the present action was brought by certain owners of property upon the east line of the street to enjoin the company from laying a second track in that portion of the street. While the action was pending the city of Los Angeles filed a complaint in intervention in which it joined the plaintiff in claiming said relief. The case was tried by the court, and judgment rendered declaring that the railroad company had the right and authority to lay down and construct a double track along said street under and by virtue of the above ordinance of 1872, and denying the relief sought by the plaintiffs and intervenor. From this judgment the plaintiffs and the intervenor have appealed.

The question presented upon the appeal involves the construction and effect to be given to the ordinance. It is contended on behalf of the appellants that the ordinance was indefinite in its terms and gave to the company an election to construct either a single or a double track along the street, and that by its original construction it elected to have only a single track thereon, and thereby exhausted whatever power to construct a double track was given it by the ordinance.

Section 17 of the act relating to the incorporation of railroad companies, passed May 16, 1861 (Stats. 1861, p. 607), provides in the fourth subdivision thereof that a railroad company may lay out its road and may construct and maintain the same with a single or double track, with such appendages "as may be deemed necessary for the convenient use of the same." It is provided in subdivision 5 of this section that the company may construct its road upon any street, avenue, or highway, and by section 21 that any county, city, or town may by a two-thirds vote of its governing body grant to the company "the use of any of the streets or highways which may be absolutely necessary in order to enable any such company to reach an accessible point for a depot in any such county, city, or town, or to pass through the same along as direct a route as possible and accommodate

the traveling and commercial interests thereof." It is under this authority that the above ordinance was passed by the city council in 1872, and the meaning of that ordinance and the extent of the grant thereby made is to be determined by the terms of the ordinance, viewed in the light of the authority given to the council for its adoption, and the circumstances under which it was passed. The grant to the company is made in the first sentence of the section, and the subsequent provisions in the section are but reservations of certain rights to the city, and obligations assumed by the company in regard to its exercise of the grant. By this ordinance the city granted to the company the right to construct "the railroad track of the Southern Pacific Railroad Company in and out of the city of Los Angeles." There is no express statement in the ordinance to that effect, but it is to be assumed that the subsequent use of the street by the company was in pursuance of the ordinance, and that at that time there was no railroad track upon Alameda street. "The railroad track of the Southern Pacific Railroad Company" was such as it was authorized to construct and maintain by virtue of the act under which the company was incorporated, and under section 17 of that act, above quoted, it was authorized to construct and maintain a single or double track, as it might from time to time find necessary or convenient for the transaction of its business. It must be held, therefore, that by the terms of the ordinance it was the intention of the city council to give to the company a right to the use of the street for the maintenance thereon of such railroad tracks as under the statute it was authorized to construct for the operation of its road.

The grant to the company is not of such a character as to require an immediate election by it of the mode in which it would avail itself of the grant, or to authorize us to hold that the mode in which it in fact has hitherto made use of the street exhausted its power to change that mode. No limitation of this character is required by the statute under which the ordinance was adopted, and there is nothing in the language of the ordinance which limits the company to the right to such use of the street as it might make in the first instance. Nor is any time prescribed within which it shall construct its tracks thereon. No inference is to be drawn

from the fact that in some places in the above section the word "track" is used, while in other places is found the phrase "track or tracks." The connection in which the word or phrase is used is not such as to require any particular significance to be given to the use of one rather than the other. The purpose of the ordinance was to enable the company to carry into effect the objects for which its road was constructed, and to enable it, in the language of section 21, "to reach an accessible point for a depot in said city," and the right of way was granted thereby "in and out of the city of Los Angeles" for the purpose of enabling it to "pass through" the city to the terminus of its route, and "to accommodate the traveling and commercial interests thereof." Unless the company was expressly required by the ordinance to construct a double track in the first instance, if it would avail itself of that privilege, reasonable business prudence would justify it in postponing such construction until the increase of its traveling and commercial interests should demand it. At the date of the ordinance the road was not completed, and, like all business enterprises of that nature, its success was more or less problematical, and, in the absence of any limitation to that effect, the council must be deemed to have granted the right of way with the privilege to the company to construct a single track upon the street at the outset, and the continued right to construct an additional track thereon in the future whenever it should become desirable from the necessities or convenience of operating its road.

The claim of the appellants that under the statute the council was required to determine in the first instance what use of the street was "absolutely necessary" for the company, and that it could not delegate such determination to the company, is untenable. The power conferred upon the city by section 21 of the statute is to grant to the company the use of such street or streets as may be necessary to enable it "to reach an accessible point for a depot in the city, or to pass through the same on as direct a route as possible, and accommodate the traveling and commercial interests thereof." But it is not required by the statute that a designation of the use which the company may make of the street shall be specified in the ordinance. The statute requires the council

to determine the street or streets of which it will give the use to the company, but from the nature of the case the council cannot determine in advance for the entire existence of the corporation what use of the street will be necessary for its business. Such use, and the necessity therefor, can be determined only as time and experience shall demonstrate, and may properly be left to the determination of the company. The grant to the defendant in section 1, above quoted, of the use of Alameda street without any limitation or qualification, leaves to the company the right to make such use of the street as the city could authorize and as circumstances may at any time thereafter require.

Neither can the contention that the ordinance is but a revocable license to use the street be sustained. (*Arcata v. Arcata etc. R. R. Co.*, 92 Cal. 639.) Moreover, the record fails to show that any attempt has been made by the city to rescind or repeal the ordinance, or to revoke the grant originally made thereby.

It is objected that the evidence is insufficient to sustain the finding that the plaintiffs have no title or interest in the land within the lines of Alameda street. This finding depends upon the effect to be given to the title which the city of Los Angeles has in the streets within the boundaries of the land patented to it by the United States. We find it unnecessary, however, to determine this question in the present case, for the reason that, as we hold that the ordinance of 1872 conferred upon the company the right to construct a double track upon Alameda street, which it can still exercise, the question of the plaintiffs' title to fee in the street is irrelevant; and for the further reason that it appears from the bill of exceptions that their claim of title extends over only the easterly half of the street, while the track which the defendant is about to construct thereon will be upon the westerly half of the street.

The judgment is affirmed.

Henshaw, J., Garoutte, J., and McFarland, J., concurred.

BEATTY, C. J., dissenting.—I dissent. It is the settled doctrine of this court that public grants are to be strictly construed against the grantee. The construction given to

this grant seems to me to go to the extreme of liberality in favor of the grantee. By the act of May 16, 1861, quoted in the opinion of the court, the governing body of a city or county may grant to a railway company the use of any streets or highways "which may be absolutely necessary in order to enable such company to reach an accessible point for a depot in any such county, city, or town, or to pass through the same along as direct a route as possible and accommodate the traveling and commercial interests thereof." This provision of the act is, I think, erroneously construed in the opinion of the court, which holds in effect that a city having once granted to a railway company a right of way upon one of its streets to reach its depot or to pass through the city on as direct a route as possible, thereby subjects such street to the control of the railway company to be used by it at its discretion in such manner as its convenience may dictate and in violation of the reasonable conditions of the grant. The statute, in my opinion, contemplates the grant of a mere right of way for the track (of a single track road) or tracks (of a double track road) to the depot or through the town, and such use only of the selected street as may be absolutely necessary for those purposes.

Construing the ordinance in connection with the statute, I think it was meant to grant only such right of way, and the use of the expression "track or tracks" in the ordinance had reference to the right of the grantee under the statute to construct its road with a single or a double track. If it should construct a single track road, it was to have the right to lay that single track on the street; if it should construct a double track road, it was to have the right to lay those double tracks along the street; and, in either case, the grant was made upon the reasonable and lawful condition that such track or tracks should be located as near the center of the street as possible, leaving the space on either side free for the passage of persons and vehicles. This condition made it necessary for the railroad company, in accepting and acting upon the grant, to make its election between a single and a double track. If it was a single track road, and laid a single track along the street, it was necessary that the two rails should be laid equidistant from the center line of the street.

If it was a double track road it was necessary that each track should be equidistant from the center line of the street.

The company made its election. It laid a single track and laid it in the center of the street. It obtained access to its depot and a direct route through the city, and after using the franchise for twenty years proceeded to lay an additional sidetrack on one side of the center of the street and in clear violation of one of the express conditions of the grant. If it can violate this condition I do not see that it may not with equal right violate every other condition of the grant. I do not see, for instance, why it cannot lay another sidetrack on the other side of the street if it should determine such additional track to be necessary for its business.

As to the point that the railroad company was bound by its election to lay a single track in the center of the street, the appellants have cited in their briefs and in their petition for a rehearing the case of *Rush v Jackson*, 24 Cal. 308. No attempt is made in the opinion of the court to distinguish that case, and in my opinion it cannot be distinguished from this case except by saying that the grounds for holding the grantee of the franchise bound by his election are much stronger in this case than in that.

The judgment of the superior court, in my opinion, was erroneous.

Rehearing denied.

[S. F. No. 1286. Department Two.—August 23, 1900.]

THE PEOPLE ex rel. R. H. WARFIELD, Respondent, v.
SUTTER STREET RAILWAY COMPANY, Appellant.

USURPATION OF FRANCHISE—CIVIL ACTION—PENAL JUDGMENT.—An action for the usurpation of a franchise, based on section 803 of the Code of Civil Procedure, is in the form of a civil action, and as to the procedure therein follows the rules prescribed for civil cases, but the judgment rendered therein adjudging the defendant guilty of usurping the franchise, and imposing a fine therefor pursuant to section 809 of that code, is penal in its nature.

ID.—INTEREST ON FINE NOT ALLOWED.—The same rule as to interest on the fine imposed in such action should govern as applies to a judgment for a fine in any criminal case, and no interest can be allowed thereupon. The judgment does not come within the terms of sections 1915 and 1920 of the Civil Code.

APPEAL from an order of the Superior Court of the City and County of San Francisco denying a motion to quash an execution for a fine for usurping a franchise, or to amend the same by striking out the interest on the fine provided for therein. J. C. B. Hebbard, Judge.

The facts are stated in the opinion.

Naphtaly, Freidenrich & Ackerman, and Garber & Garber, for Appellant.

W. F. Fitzgerald, Attorney General, and Freeman & Bates, for Respondent.

GRAY, C.—This action is based on section 803 of the Code of Civil Procedure, and was brought to have the franchise of defendant to maintain a street railway on Bush and other streets of San Francisco declared forfeited, and to have defendant adjudged to have usurped a franchise and fined in a sum not exceeding five thousand dollars, as provided in section 809 of the Code of Civil Procedure. The plaintiff had judgment as demanded, and the court imposed a fine on defendant of five thousand dollars. The defendant appealed to this court and the judgment was affirmed. (*People v. Sutter Street Ry. Co.*, 117 Cal. 604.) On the going down of the *remittitur* execution was issued against defendant to collect the fine. Defendant tendered the five thousand dollars and costs, but refused to pay interest on the fine, and moved that the execution be quashed or amended by striking therefrom the portion relating to interest upon said fine. By an order duly entered the court denied the motion, and the appeal before us is from that order.

The only question for determination is, Does the judgment imposing the five thousand dollars fine on defendant come within the provisions of section 1920 of the Civil Code, providing that "interest is payable on judgments recovered in

the courts of this state at the rate of seven per cent per annum"? We say, without hesitation, that the case is not within the section quoted, and no interest on the fine can be recovered. It is true the provisions of law on which the action is based are found in the Code of Civil Procedure, and the action itself takes the form of a civil action, and, as to the procedure therein, it follows the rules prescribed for civil cases, and yet it is plain that the judgment adjudging the defendant to have usurped and unlawfully exercised a franchise and fining it five thousand dollars therefor is clearly penal in its nature, and the same rule as to interest should govern as applies to a judgment in any criminal case. Judgments which are penal in their nature, and have for their sole object the punishment of an offender, do not come within either the letter or spirit of said section. The section provides only for interest on "judgments recovered." The word "recovered" implies that the judgment referred to is one obtained by way of compensation and in return for an injury or a debt. The defendant in this case was not fined for the purpose of compensating the state, nor for the purpose of returning to it anything that had ever theretofore belonged to it. The judgment of fine was solely for the purpose of punishment, and was not based on any evidence of loss or damage, but rested (within the limit prescribed by the statute) solely within the discretion of the court. It would, we think, be more proper to speak of it as a sentence or judgment imposed on the defendant than to say it was a judgment recovered against him.

Again, the section in question is found in a chapter of the Civil Code entitled "Loan of Money," and in that same chapter, at section 1915, interest is defined as follows: "Interest is the compensation allowed by law or fixed by the parties for the use, or forbearance, or detention of money." On no theory of compensation to the state for the use or detention of money can interest be allowed on the judgment. The defendant was never indebted to the state, and the money derived from the fine imposed on defendant was not to be paid into the state treasury until it should be collected (Code Civ. Proc., sec. 809); and while the express provision is made for the disposition of the fine, there is no provision as to any interest on such fine, for the good reason, no doubt, that it was never

contemplated that a contention would ever be made that a fine would bear interest if not paid at the date of its imposition.

It is provided in the Penal Code, at section 1206, that "a judgment that the defendant pay a fine constitutes a lien, in like manner as a judgment in a civil action"; and at section 1214 it is provided that, "if the judgment is for a fine alone, execution may be issued thereon as on a judgment in a civil action." The Code of Civil Procedure had already provided generally for judgment liens and for the issuance of executions on judgments, but it seems the legislature thought those provisions would not be applicable to judgments in criminal cases unless they were specially made so. It follows that if this was necessary as to liens and executions, a similar special enactment was also necessary to make the general provision of the Civil Code as to interest applicable to judgments of a penal nature. And the fact that no such special enactment is to be found in the Penal Code or elsewhere furnishes an argument that the legislature did not intend that judgments of the latter character should bear interest.

The fine could be inflicted upon defendant only on its being "adjudged guilty of usurping," etc. (Code Civ. Proc., sec. 809); which further illustrates that the case has a criminal aspect as to this feature of it, and is not to be distinguished in principle from the case of *State v. Steen*, 14 Tex. 396. In that case the defendant was convicted of a crime and fined two hundred and fifty dollars, and appealed to the supreme court, which affirmed the judgment. Thereafter the district attorney claimed for the state interest on the judgment. The district court discharged the defendant upon payment of the principal of the judgment without interest, from which order the state appealed, and the supreme court of Texas, in affirming the action of the court below, said: "A fine, it is true, is a judgment. In criminal law it is a pecuniary punishment imposed by the judgment of a court upon a person convicted of crime. But we do not think it such a judgment as comes within the intention of the law allowing interest upon judgments. . . . It is imposed as a punishment solely and its payment as the term imports, in an end of the punishment. . . . There is equity and justice in allowing interest

to be recovered upon judgments rendered upon pecuniary demands; but it is not easy to perceive what equity there can be in requiring punishments to accumulate by the lapse of time, or upon what principle the state can demand that fines shall accumulate in the form of interest."

We advise that the order appealed from be reversed and the cause remanded, with directions to the court below to quash the writ only as to that portion of it relating to interest upon the fine.

Britt, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is reversed and the cause remanded, with directions to the court below to quash the writ only as to that portion of it relating to interest upon the fine.

McFarland, J., Temple, J., Henshaw, J.

[Crim. No. 621. In Bank.—August 23, 1900.]

THE PEOPLE, Respondent, v. EPIGMENIO MELENDREZ, Appellant.

CRIMINAL LAW—HOMICIDE—MANSLAUGHTER—MISTAKE OF DEFENDANT—PURSUIT OF UNKNOWN FUGITIVE FROM JUSTICE.—If a defendant accused of murder mistook the deceased, who was shot while running from him after being ordered to stop, for a fugitive from justice unknown to the defendant, who had stabbed another man, and of whom the people of the village, including the defendant, were in pursuit, and if the killing was the result of such mistake, it was without malice, and could not amount to more than manslaughter.

ID.—REASONABLE CAUSE FOR MISTAKEN BELIEF—PROVINCE OF JURY—IMPROPER INSTRUCTION.—Where there is a state of the evidence from which the jury might find that the killing was the result of a mistake in attempting to arrest the wrong person, while lawfully seeking to arrest a fugitive who had committed a felony, it is the province of the jury to determine whether the defendant had reasonable cause to believe that the deceased was the person who had committed the felony; and an instruction taking that question from the jury, and stating that in contemplation of law, assuming all

the evidence to be true, the defendant had no reasonable cause so to believe, and that he was guilty of an unlawful act if he attempted forcibly to arrest the deceased, is improper, and derogates from the constitutional functions of the jury.

ID.—QUESTION OF LAW AS TO REASONABLE CAUSE—APPLICABILITY OF RULE.—The rule applied in favor of a defendant, that where, upon the undisputed facts before the jury, the defendant had reasonable cause to believe at the time of the killing that the deceased had committed a felony, it was the duty of the court so to instruct the jury, cannot be applied against the defendant in a criminal case to establish a want of probable cause for a mistaken belief.

ID.—REASONABLE DOUBT—ABSENCE OF MALICE—IMPROPER INSTRUCTION.—An instruction to the effect that before the jury would be warranted in returning a verdict of manslaughter they should be satisfied from the evidence beyond a reasonable doubt that the defendant without malice killed the deceased is erroneous; and though the law is elsewhere correctly given, the error cannot be deemed without prejudice, where the court took the question of acquittal from the jury, and left it to them only to determine the grade of the offense.

APPEAL from a judgment of the Superior Court of San Diego County and from an order denying a new trial. E. S. Torrance, Judge.

The facts are stated in the opinion.

Omar Bushnell, for Appellant.

Tirey L. Ford, Attorney General, and A. A. Moore, Jr., Deputy Attorney General, for Respondent.

SMITH, C.—The defendant was convicted of the crime of murder in the second degree, and appeals from the judgment and from an order denying a new trial.

The killing took place in the county of San Diego, near the village of Hedges. A man had been stabbed there by one Rosales, who had escaped. The people of the village, or many of them, including the defendant, were in pursuit of the fugitive, who—as also the deceased—was not personally known to the defendant. In the course of the pursuit the defendant came upon the deceased—a colored man, named John Lee—and shot him while running away. According to the testimony of defendant, he called on the deceased several times to halt. Deceased then turned around and

drew a pistol, and defendant, believing he would shoot, fired upon him; upon which deceased turned and ran, and defendant fired upon him a second and a third time. The deceased fell at the third shot. The same account substantially was given by the defendant, in answer to questions of one of the witnesses for the prosecution, immediately after the transaction. The account given by the other witnesses for the prosecution—who saw the transaction from a distance—was substantially to the same effect, except that they did not hear what said said or see the deceased draw the pistol. But one of them testifies to seeing the defendant pick up the pistol from the ground at or near the place where the deceased was when the first shot was fired.

Were this all the evidence in the case, the inference would be irresistible that the defendant mistook the deceased for the fugitive when he and the rest were in pursuit, and that the killing was the result of this mistake. And from this it would follow that the killing was without malice, and consequently could not amount to more than manslaughter. (Pen. Code, sec. 7, subd. 4, 20, 190; 1 Wharton's Criminal Law, secs. 87, 410, 434, 492; 1 Bishop's Criminal Law, secs. 303, 305.) Nor is there anything in the record to rebut this presumption, unless it be the testimony of one Bernal, to the effect that defendant, in starting on the pursuit, said, "I am going to shoot the first son of a bitch I meet"; which was the only evidence in the case tending to show malice. But this testimony was contradicted by the defendant, who denies he made any such threat, and his testimony is corroborated by one Antunez, who was present during the time to which Bernal's testimony refers and heard no such remark.

1. Upon this state of the evidence the court—after instructing the jury that "a private person may arrest another when a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it"—further instructed them that "whether the facts and circumstances established by the evidence will constitute reasonable cause for believing that a person attempted to be arrested has committed a felony, is a question of law to be determined by the court, and cannot . . . be left to the determination of a jury"; and accordingly the court instructed the jury as follows: "I am satisfied, assuming all

the testimony to be true upon the question of probable cause, that in contemplation of the law the defendant had no reasonable cause to believe that John Lee was the person who had committed the felonious assault upon Charles Salamon; and, this being true, he was guilty of an unlawful act, in case you find from the evidence that he was attempting forcibly to arrest John Lee."

As it was an admitted fact in the case that at the time of the killing the defendant "was attempting forcibly to arrest John Lee," this instruction cannot otherwise be regarded than as, in effect, an instruction to find the defendant guilty; for the killing of a man "in the commission of an unlawful act" is, at least, manslaughter (Pen. Code, sec. 192, subd. 2); and the jury were in fact, in the next paragraph, thus expressly instructed. Thus the sole issue left for the jury to determine was as to the grade of the offense—whether murder or manslaughter.

Presumably these instructions were based on the authority of the decision in *People v. Kilvington*, 104 Cal. 86¹; but in that case the point decided was merely that, upon the facts established by the evidence without contradiction, "the defendant had reasonable cause to believe at the time of the killing that the deceased had committed a felony." Thus the ruling was in favor of the defendant; and doubtless, whether as to probable cause or any other matter of defense, where, on the undisputed facts, the defense is established, it is the duty of the court so to instruct the jury. But it does not follow that, upon this or any other issue, the court is at liberty to instruct the jury that the defendant has failed to make out his defense. Nor is it to be presumed that in the case cited the court intended so to rule; for this would be to derogate from the constitutional functions of the jury. (Const., art. I, sec. 7.) And in fact there is nothing in the decision to indicate such an intention. The court simply applied in favor of the defendant the rule established in civil cases for malicious prosecution or false imprisonment; which is, that to establish probable cause "there must be such a state of facts as would lead a man of ordinary care and prudence to believe or entertain an honest and strong suspicion that the person is guilty." But this rule has never been applied, as

¹ 43 Am. St. Rep. 73.

against the defendant in a criminal case, to establish a want of probable cause for a mistaken belief, nor should it be. For in such cases the degree of intelligence evinced by the defendant must always be an important element in determining his guilt. Nor is it reasonable that the same rule should be applied to all of a class, including individuals of all grades of intelligence, from the least to the highest. At least, if this or any other artificial rule is to be applied as establishing the guilt of the accused, it must be the province of the jury to apply it.

2. Under the instruction we have been considering, the jury, as we have observed, were bound to find the defendant guilty either of murder or of manslaughter; and the sole issue left to them was to determine the grade of the offense. On this state of the issues the court, after instructing the jury as to the evidence necessary to justify a finding of murder in the first or of murder in the second degree, instructed them in effect that before they would be warranted in returning a verdict of manslaughter they should be satisfied from the evidence, "beyond a reasonable doubt," that "the defendant without malice killed John Lee," etc.; which was in effect to instruct them that they were to find the defendant guilty of murder unless they were satisfied beyond a reasonable doubt that the killing was without malice. This was doubtless an inadvertence on the part of the court, and the law is correctly given in another part of the charge. But in view of the fact that the question of acquittal had in effect been already withdrawn from the jury, the instruction could not well have been otherwise understood than as expressed.

We advise that the judgment and order denying a new trial be reversed.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed.

Garoutte, J., Harrison, J.,
Van Dyke, J., Temple, J.,
McFarland, J.

[S. F. No. 2131. In Bank.—August 23, 1900.]

F. C. GAMACHE, Petitioner, v. JOSEPH H. BUDD, Judge of Superior Court of San Joaquin County, Respondent.

BILL OF EXCEPTIONS—DELAY IN PRESENTATION—REFUSAL OF SETTLEMENT—MANDAMUS.—Where it appears that the draft of a bill of exceptions, with the proposed amendments thereto, were not presented to the judge nor to the clerk, nor to any deputy clerk for the judge, until several months after the lapse of the time limited for such presentation in section 650 of the Code of Civil Procedure, without any showing of excuse for the delay, the judge is warranted in refusing to settle the bill, and will not be compelled by *mandamus* to settle the same.

PETITION for *mandamus* from the Supreme Court to the judge of the Superior Court of San Joaquin County. Joseph H. Budd, Judge.

The facts are stated in the opinion of the court.

A. H. Carpenter, and Haven & Haven, for Petitioner.

VAN DYKE, J.—*Mandamus* to compel the respondent, as judge of the superior court of the county of San Joaquin, to settle a bill of exceptions.

In the petition for the writ it is alleged that in an action wherein the petitioner was plaintiff and the south school district of San Joaquin county and others were defendants, tried before the respondent, a judge of the superior court of said county of San Joaquin, a decree was therein rendered in favor of said defendants and against said plaintiff, the petitioner herein, on the third day of June, 1899; that no notice of the filing of the decision therein was served upon the plaintiff or his attorneys, and that on the 24th day of June, 1899, said plaintiff prepared and served his proposed bill of exceptions therein upon the attorneys of said defendants in said cause; that amendments to said bill of exceptions were proposed and served upon the petitioner, the plaintiff in said cause, on the third day of July, 1899, and it is alleged that thereafter, on the eighth day of July, 1899, the petitioner handed said proposed original bill of exceptions,

together with proposed amendments thereto, to the clerk of said superior court to be delivered by him to said judge who tried the cause; that said judge having failed to give notice of the time and place for settling the said statement, the petitioner's attorney called his attention to the fact, and that he thereupon fixed October 21, 1899, as the time for the settlement of said bill of exceptions, and upon that day the said judge refused to settle or certify any bill of exceptions therein, upon the ground of delay in presenting the same to the court.

In the answer of the respondent it is denied that the bill of exceptions and amendments were presented to the clerk of said court to be handed to respondent as such judge, or at all, prior to October 16, 1899, or that said proposed bill of exceptions and amendments were ever presented to respondent as such judge prior to the 21st of October, 1899; and for the reason that said bill of exceptions and amendments were not presented as required by law, or at all, prior to the time specified, and because no proper showing was made why they were not presented before, the respondent refused to settle the same.

The code provides that when a party desires to have exceptions taken at a trial settled in a bill of exceptions he may, within the time therein specified, prepare a draft of the bill, serve the same or a copy thereof upon the adverse party, and within ten days after such service the adverse party may propose amendments thereto and serve the same, or a copy thereof, upon the other party. "The proposed bill and amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill to the judge who tried or heard the case upon five days' notice to the adverse party, or be delivered to the clerk of the court for the judge. When received by the clerk he must immediately deliver them to the judge, if he be in the county. . . . When received from the clerk the judge must designate the time at which he will settle the bill, and the clerk must immediately notify the parties of such designation." (Code Civ. Proc., sec. 650.)

The answer of the respondent in this case having raised a question as to a matter of fact essential to the determination of the cause, this court ordered the case referred to Judge Edward I. Jones, of San Joaquin county, to take and report the

testimony and his findings upon the issue of fact. Judge Jones finds from the testimony taken before him, as fact, "that the petitioner did not, on the eighth day of July, 1899, or at any time prior to the sixteenth day of October, 1899, hand the proposed bill of exceptions or the proposed amendments thereto, specified in the petition and answer, to the clerk of the superior court in and for the county of San Joaquin, or to any of his deputies."

The other findings on the issues presented are in favor of the respondent, and show that his refusal to settle the bill of exceptions was on the ground solely that the same was not presented in time, and that he had no authority in law to settle the same. Upon the coming in of the report of the testimony and findings of Judge Jones, as referee, the petitioner's attorney filed exceptions to said findings on the ground that the referee failed to find all of the material issues raised by the pleadings, and that said findings are not supported by the evidence, and that they are against law.

All the material issues raised by the pleadings necessary to enable the court to pass upon the application for the writ are covered by the findings, and the evidence is sufficient to support the findings. Upon the facts as found the respondent, as judge of the court who tried the cause in question, was not required to settle the bill of exceptions. In fact, it was his duty not to do so without some showing why the same was not presented as required by law.

Writ denied.

McFarland, J., Garoutte, J., Temple, J., Beatty, C. J., and Harrison, J., concurred.

[Crim. No. 594. In Bank.—August 23, 1900.]

THE PEOPLE, Respondent, v. WILLIAM SULLIVAN,
Appellant.

CRIMINAL LAW—HOMICIDE—CIRCUMSTANTIAL EVIDENCE—DIFFERENCE IN WEIGHT OF BULLET.—Where the circumstantial evidence that the defendant committed the crime of murder with which he was charged was such that the jury were justified in finding that the bullet which killed the deceased was shot from a rifle borrowed by the defendant, the mere fact that the distorted bullet found in the body weighed four grains less than an intact model bullet shot from the same rifle, the loss in the weight of which was accounted for in the testimony of a gunsmith, cannot be ground for setting aside the verdict of the jury whose province it is to weigh the evidence and decide upon the credibility of witnesses.

ID.—TRACING OF GUN—DISPOSITION BY DEFENDANT—FLIGHT.—It was competent for the prosecution to trace the gun borrowed by the defendant from the time it came into his hands until finally located in the possession of the party producing it, and to prove the disposition made of it by the defendant in a distant town, in connection with his departure from the neighborhood immediately after the homicide, and then absenting himself from the state, as a circumstance tending to show flight and guilty knowledge.

ID.—ADMISSIBILITY OF GUN.—Where the gun was fully traced and identified, and it was shown that both before and after borrowing it the defendant had threatened to kill the deceased, and was seen going with it shortly before the homicide toward the place where the homicide was committed, the gun is admissible in evidence.

ID.—IDENTIFICATION OF ACQUAINTANCE—HARMLESS RULING.—The admission of the testimony of a witness as to his knowledge that an acquaintance was a one-armed man, in response to a question objected to as to how many arms such person had, probably asked for the purpose of identification, or to test the acquaintance of the witness, is harmless, where it is not shown and cannot be seen how the answer to the question could prejudice the defendant.

ID.—MISCONDUCT OF JURY—INTOXICATION OF JUROR—CONFLICTING EVIDENCE—OBSERVATION BY JUDGE—FINDING.—Where a new trial was sought for misconduct of the jury, in that one of the jurors became intoxicated near the close of the trial during a recess, so that he was too drunk to understand the instructions and properly to consider the case, and the evidence was conflicting, and the trial

judge, having the best opportunity to observe the condition of the juror, found that he was not incapacitated, his finding will not be disturbed upon appeal.

ID.—EVIDENCE OF MISCONDUCT—EXCLUSION OF ORAL TESTIMONY—AFFIDAVITS.—The exclusion of oral testimony of witnesses subpoenaed by the defendant in support of the charge of misconduct is not prejudicial, where the affidavits of each of the witnesses was presented, if there is no showing that any one of them had refused to testify fully by affidavit to all the material facts within his knowledge. The law allows no difference between affidavits or depositions or oral testimony when offered in support of motions.

ID.—CROSS-EXAMINATION OF AFFIANTS—DISCRETION OF COURT.—It is in the discretion of the court to allow or to refuse to allow the cross-examination of witnesses who testify upon motion for new trial by affidavits or counter-affidavits on the question of misconduct.

APPEAL from a judgment of the Superior Court of Tuolumne County and from an order denying a new trial. G. W. Nicol, Judge.

The facts are stated in the opinion of the court.

J. P. O'Brien, for Appellant.

Tirey L. Ford, Attorney General, and C. N. Post, Assistant Attorney General, for Respondent.

VAN DYKE, J.—The defendant was indicted by the grand jury of the county of Tuolumne for the crime of murder, in the killing of one William Spencer Gilliard, and was tried and convicted of murder in the first degree. The appeal is taken from the judgment entered upon said verdict and from the order overruling defendant's motion for a new trial.

The appellant presents and urges three grounds of error for a reversal: 1. That the evidence is insufficient to sustain the verdict; 2. Rulings of the court on the admission of evidence; 3. Misconduct of the jury.

1. The evidence is circumstantial. The following is a synopsis of the same: The deceased, Gilliard, in April, 1897, was employed as a watchman on the night shift at the Jumper mine in Tuolumne county, and the defendant at the same time was employed at the same mine as a miner. On the 16th of April, 1897, Kelly, the foreman of the mine, discharged the defendant from employ at the mine, between

6 and 7 o'clock in the evening. The defendant blamed the deceased, Gilliard, for his discharge, and made threats regarding him. The deceased went to work on the night shift at about 7 o'clock. The defendant on the night of his discharge remarked that he, the deceased, might work that shift, but that he would not work the next. Immediately after his discharge the defendant went home to his boarding-house and told his landlady that he had been discharged and that he would "fix Mr. Gilliard." On the afternoon of the killing the defendant said in the presence of two witnesses that Gilliard should "bite the dust," and that he would kill Gilliard. On the evening of the killing, between 7 and 9 o'clock, defendant borrowed a 44-caliber '73 model Winchester rifle from E. S. Schaffner, telling Schaffner that he was taking a few days lay-off and was going prospecting next day. On that same night he went to the room occupied by himself and one Corcoran before 9 o'clock, and had with him a Winchester rifle which he loaded then and there, and while in Corcoran's room he berated both Boone and Gilliard, and said he would make them both "bite the dust" before morning. He said he would kill them both for getting him discharged. About half-past 9 o'clock on the same night defendant was seen by one Frank Hill going in the direction of the Jumper mine and carrying a rifle at the time. It took ten or fifteen minutes to walk from where Hill was down to the Jumper mine. On the evening of the 17th of April, the next evening after the defendant was discharged, the deceased, together with F. W. Greiner and E. G. Boone, was sitting in the building at the shaft of the Jumper mine between half-past 9 and a quarter to 10 o'clock, when a gunshot was fired through a crack in the building and a bullet struck deceased in the back, on the right side, from the effects of which he died next day. Defendant disappeared immediately from the neighborhood, and was not seen there again until brought back under arrest from Silver City, New Mexico, in April, 1899, two years after the homicide. Soon after the homicide he was seen at Peoria Flat, some eleven miles by road from the Jumper mine, where he tried to sell the rifle he had borrowed to one John Darrow. The rifle was subsequently re-

covered by constable Leland from an old man named McCullum or McLean, who lived at Peoria Flat, with whom the defendant had left it with a request that it be returned to Mr. Schaffner, from whom it had been borrowed.

Appellant's counsel devotes considerable space in his argument to the fact that the ball found in the body of the deceased was of less weight than that of a 44-caliber '73 model Winchester rifle, the one borrowed by the defendant. Mr. Rowell, a gunsmith, after examining the ball found in the body, testified: "Bullets of that kind are determined by weight. They are given in all the catalogues of cartridges such a weight bullet for such cartridges. A ball distorted you can't tell by the size; the only way is to tell by the heft, and a portion of that lead is gone, because it can't penetrate any substance and be distorted as much as that is without losing some weight. . . . This is four grains lighter than a ball intact, 44-'73 model Winchester. From the battered condition of that ball my best opinion is that it is a 44-caliber. . . . I compared this with an intact bullet, 44-caliber, by weighing that, and I found that this exhibit here is four grains lighter. I can give you the weight of the ball offered in evidence. It is one hundred and ninety-three grains. The bullet of the model of '73 Winchester rifle is four grains heavier than this one." Notwithstanding the slight difference in weight in the bullet, under the circumstances it cannot be said that the jury were not justified in finding that it was the one shot from the gun borrowed by defendant, nor can it be said that the chain of circumstantial evidence was not sufficient to support the verdict of the jury. "It is the peculiar province of the jury to weight the evidence and decide upon the credibility of witnesses; and it is not our practice to disturb verdicts on this ground unless there is either a total deficiency in the evidence or it preponderates so greatly against the verdict as to render it clear that the jury must have been under the influence of passion or prejudice." (*People v. Manning*, 48 Cal. 335. See, also, *People v. Mayes*, 66 Cal. 597¹; *People v. Ah Jake*, 91 Cal. 98; *People v. Freeman*, 92 Cal. 359.)

2. Objection was made to the question as to how many arms a Mr. Coffin had, and the answer, over the objection,

¹ 56 Am. Rep. 126.

was that he was a one-armed man. The question was probably asked for the purpose of identifying Mr. Coffin, or testing the witness in reference to his acquaintance with Coffin. At any rate it is not shown, nor can it be seen, how the answer to the question could prejudice the defendant. The question, "Who did return the gun to you," was properly permitted. It was competent for the prosecution to trace the gun from the time it came into the hands of the defendant until finally located in the possession of the party producing it at the trial. It was proper also to show what disposition defendant made of the gun after the homicide, as a circumstance tending to show flight and guilty knowledge; and it was also proper to admit the gun in evidence. The case of *People v. Hill*, 123 Cal. 571, relied upon by appellant's counsel, is altogether different from this. In that case a large club was admitted in evidence, and this court in its opinion said: "There was no evidence identifying the stick as the one with which the defendant struck the deceased, or in any way connecting the defendant with it." Here it was shown the defendant borrowed the gun in question, and with this rifle in his hand he told his roommate that he would kill the deceased, and he was seen going toward the place where the homicide was committed, with this gun. The court properly overruled the objection of defendant to questions relative to identifying the rifle.

3. The alleged misconduct of the jury was the drinking of intoxicating liquors by one of the jurors during a recess of the court just before the close of the trial, so that at the time the charge of the court was delivered he was too drunk to understand the instructions, and continued too drunk to properly consider the case. Conceding that the misconduct alleged would have been sufficient to vitiate the verdict if the charges had been substantiated, it is a sufficient answer to this assignment of error to say that the evidence of intoxication was conflicting, and the trial judge, who himself had the best opportunity of observing the condition of the juror, having found that he was not incapacitated, this court cannot disturb the finding.

But it is further contended that the trial court erred in excluding evidence offered by appellant to prove his charge

of misconduct. As regards this point the facts are that when the defendant was arraigned for sentence and presented his motion for a new trial he offered in support of his motion his own affidavit and those of two other persons, to the effect that Mackey—one of the jurors—was drinking in a saloon just before the close of the trial and was drunk while the judge was delivering his charge. He also asked leave to introduce the oral testimony of some witnesses who, he stated, were there present in obedience to subpoena. Upon objection of the district attorney to the taking of oral testimony in support of the motion, the court ruled that it would not hear oral evidence and that the showing must be made by affidavit, basing its ruling upon the authority of *People v. Tucker*, 117 Cal. 229. The defendant then asked a continuance of the hearing for three or four days to enable him to procure the affidavits of the witnesses who had been subpoenaed. This application was denied, but counsel for defendant was allowed about three hours to procure the affidavits and in the meantime the proceeding was suspended. When the court reconvened, at the expiration of the time allowed, the defendant offered three additional affidavits in support of his charge of misconduct, and the affidavit of his counsel to the effect that he could not secure the testimony concerning the intoxication of the juror as effectively by affidavits as he could and would by the oral testimony of said witnesses. There was no allegation that any of his witnesses had refused to make affidavit, and his language implies the contrary. It would appear, then, that in spite of the adverse ruling of the court he was able to adduce all of his testimony on the subject of intoxication, and that his only ground of complaint is that testimony by affidavit is not so effective as oral testimony. This may possibly be so, but the law recognizes no difference between affidavits or depositions and oral testimony when offered in support of motions, and unless it should be made to appear that a witness had refused to testify fully by affidavit to all the material facts within his knowledge (and nothing of the sort appears in this case), it could not be said that the moving party had suffered any prejudice by the refusal to hear oral testimony. This conclusion renders it unnecessary to decide

whether it would be held an abuse of discretion to refuse to hear oral evidence in support of a charge of misconduct of jurors when it appeared that the affidavits of witnesses could not be procured. It is, perhaps, true, as held in *People v. Tucker, supra*, that it is within the discretion of the court to require all evidence in support of the motion for a new trial in criminal causes to be put in the form of affidavits (or depositions), though there is no provision in the Penal Code for the use of affidavits except when the ground of the motion is newly discovered evidence. (Pol. Code, sec. 1181.) If the matter is governed by the rules of evidence in civil actions, which, with certain exceptions, are made applicable in criminal actions (Pol. Code, sec. 1102), then sections 2002 et seq. of the Code of Civil Procedure apply, and it would seem that the only result of refusing to hear the oral evidence of a witness who will not make his affidavit would be to give the defendant the right to take his deposition under subdivision 5 of section 2021 of the Code of Civil Procedure. But, as above stated, it is not necessary to decide upon this matter in the present case, and the foregoing remarks are merely intended to direct attention to the possible danger or inconvenience of refusing under all circumstances to hear oral evidence in support of a charge of misconduct of jurors.

Error is also assigned upon a ruling of the superior court refusing to allow a cross-examination of the witnesses who made counter-affidavits on the question of misconduct. This, we suppose, is a matter resting in the discretion of the trial court, and nothing appears in the present case to indicate an abuse of discretion.

The judgment and order appealed from are affirmed.

Harrison, J., Temple, J., McFarland, J., Garoutte, J., and Beatty, C. J., concurred.

Rehearing denied.

[Sac. No. 567. In Bank.—August 24, 1900.]

G. W. BAKER, Receiver, etc., Respondent, v. MABEL BRETT VARNEY, Appellant. ELLWOOD VARNEY et al., Defendants and Respondents, and A. E. WILLIAMS, Intervenor and Respondent.

FORECLOSURE OF MORTGAGE—RECEIVER OF RENTS AND PROFITS—STIPULATION IN MORTGAGE—JURISDICTION—VOID APPOINTMENT.—In an action to foreclose a mortgage, the court has no jurisdiction to appoint a receiver of the rents, and profits of the mortgaged property, based merely upon a stipulation in the mortgage for such appointment in case of default and foreclosure, without any showing of facts warranting the appointment under section 564 of the Code of Civil Procedure; and an appointment so made is void.

ID.—POWER OF COURT LIMITED—CONSENT INEFFECTUAL.—The power of the court to appoint a receiver in an action of foreclosure is limited to the cases provided for in section 564 of the Code of Civil Procedure; and in a case where the court has no authority under the statute to appoint a receiver, such authority cannot be conferred by consent or stipulation of the parties.

APPEAL from an order of the Superior Court of Sutter County denying a new trial. E. A. Davis, Judge.

The facts are stated in the opinion of the court.

R. Platnauer, J. H. McKune, and McKune & George, for Appellant.

Richard Belcher, for G. W. Baker, Receiver, Respondent.

Albert M. Johnson, for A. E. Williams, Intervenor and Respondent.

F. S. Sprague, and White & Seymore, for Charles H. Lowell and W. A. Fountain, Defendants and Respondents.

Ellwood Varney, *in pro. per.*

McFARLAND, J.—The plaintiff herein was appointed as a receiver in a suit brought by the intervenor for the foreclosure of a mortgage upon certain lands in Sutter county,

and brought this action as such receiver to recover possession of certain cattle claimed by him to be the rents and profits of the mortgaged property. It is contended by appellant that the plaintiff cannot recover in this action because his appointment as receiver was void; and, as we think that this contention must be sustained, it will not be necessary to examine any of the other questions raised in the case.

Prior to the enactment of section 564 of the Code of Civil Procedure, it had been definitely determined in this state in the case of *Guy v. Ide*, 6 Cal. 99,¹ and by other cases which followed it, that in a foreclosure suit the court had no power to appoint a receiver to collect the rents and profits pending the litigation. By the second subdivision of said section 564 power was given the court in an action to foreclose a mortgage to appoint a receiver "where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the conditions of the mortgage have not been performed, and that the property is probably insufficient to discharge the mortgage debt"; and this is the only provision giving jurisdiction to appoint a receiver in such a suit. In the case at bar the receiver was not appointed under that subdivision of the section, but the authority to appoint a receiver was based entirely upon a stipulation in the mortgage itself that upon default in the payment of the mortgage debt and on the filing of a complaint for foreclosure "the court shall, if requested by the plaintiff, name some disinterested person as receiver, and shall authorize such receiver to at once take possession of the mortgaged premises and collect the rents and profits thereof," etc. It was upon this stipulation alone that the alleged power of the court to appoint a receiver rests, and it is so recited in the order of appointment. Where a court has no authority under the law to appoint a receiver, such authority cannot be conferred by consent or stipulation of the parties. In such case consent of parties cannot confer jurisdiction upon a court, nor impose upon it the duty of taking care of and disposing of the property. It might as well be said that in a suit upon a promissory note, or upon any simple contract for the payment of money, a stipulation in the instrument by which

¹ 65 Am. Dec. 490.

the debt was evidenced that the court might appoint a receiver upon suit brought would give jurisdiction to the court to appoint such receiver; or that there could be a specific performance of a contract in any kind of a case because the parties had stipulated for a decree of specific performance. In *Scott c. Hotchkiss*, 115 Cal. 94, this court said: "No stipulation can confer jurisdiction upon the court to appoint a receiver in a case where the court has no authority given by law"; and though it might be said that this declaration was not necessary to the decision of that case, yet it clearly expresses what we hold the law to be. The rule is correctly stated in volume 12 of Encyclopedia of Pleading and Practice, pages 125 and 126, with ample authorities in the notes to sustain it, as follows: "The jurisdiction of courts having its source in the law of the land, no act of the parties can impart to a court jurisdiction which the law denies, or to a person the right to exercise judicial functions. It is accordingly a well-settled and universally applied principle that consent of parties cannot confer upon a court jurisdiction which the law does not confer, or confers upon some other court, although the parties may by consent submit themselves to the jurisdiction of the court. In other words, consent cannot confer jurisdiction of the subject matter, but may confer jurisdiction of the person." We do not think that the appellant is precluded from making this point upon the ground that it is a collateral attack. Upon the record the order appointing a receiver must be considered as based solely upon the stipulation of the parties in the mortgage, and is therefore void.

The appeal in this case is from an order denying a new trial, and the order appealed from is reversed.

Van Dyke, J., Garoutte, J., Temple, J., Harrison, J., Henshaw, J., and Beatty, C. J., concurred.

Rehearing denied.

[Crim. No. 660. In Bank.—August 24, 1900.]

In re H. C. WERNER on Habeas Corpus.

SANITARY DISTRICTS—AMENDATORY STATUTE—CONSTITUTIONAL LAW—
TITLE OF ACT—POLICE POWER—VOID LIQUOR ORDINANCE.—The amendment of 1895 (Stats. 1895, p. 8) to the act of 1891 (Stats. 1891, p. 223), entitled "An act to provide for the formation, government, operation, and dissolution of sanitary districts in any part of the state, for the construction of sewers, and other sanitary purposes," by which sanitary boards were given additional power "to determine the qualification of persons authorized to sell liquors at retail," and by which licenses to keep or sell liquors at retail were not allowed to take effect within the district without the approval of the sanitary board, is unconstitutional and void, as not being embraced within the title of the original act, and as not being within article XI of the constitution granting local police power to counties, cities, towns, and townships; and a liquor ordinance of a sanitary district based upon such amendment is without authority of law and void.

ID.—PUBLIC CORPORATIONS NOT MUNICIPAL—POWER OF LEGISLATURE—
CONSTRUCTION OF CONSTITUTION—MAXIM.—Sanitary districts, like irrigation and reclamation districts, are public corporations, not municipal; and the legislature has no power to graft upon them a subject foreign to the purposes of the act creating them, and which falls within the police power possessed by municipalities organized for governmental purposes. Under the maxim of construction, *Expressio unius est exclusio alterius*, the legislature cannot clothe a public corporation not municipal with the local governmental powers conferred by the constitution upon counties, cities, towns, and townships.

ID.—PENAL LEGISLATION BY SANITARY DISTRICT—QUERY.—It seems that the legislature cannot delegate to a sanitary district the power of enacting penal legislation of any kind. [Per McFarland, J.]

HABEAS CORPUS in the Supreme Court to the sheriff of Los Angeles County, to test the validity of a commitment for violation of an ordinance of the North Pasadena Sanitary District, under a judgment rendered by H. H. Klumroth, Justice of the Peace of Pasadena Township. Judgment affirmed upon appeal. B. N. Smith, Judge.

The facts are stated in the opinion of the court.

Frank F. Davis, for Petitioner.

C. C. Wright, for Respondent.

VAN DYKE, J.—The petitioner, Werner, was convicted in the justice's court of Pasadena township and sentenced to pay a fine of fifteen dollars, or, in default of such payment, be confined in the county jail of Los Angeles county for the period of fifteen days. On appeal to the superior court of Los Angeles county the judgment of the justice's court was affirmed. The relator, failing to pay his fine, was committed to the county jail. The conviction was had under a resolution of the board of North Pasadena sanitary district, which reads as follows: "Any person who shall within North Pasadena sanitary district keep a saloon or sell liquors at retail, without first having his license approved by the sanitary board of said district, shall be guilty of a misdemeanor, and shall upon conviction thereof be punished by imprisonment in the county jail not exceeding one month, or by a fine not exceeding one hundred dollars, or by both." The validity of this ordinance is the question to be considered. The act for the formation of sanitary districts was passed March 31, 1891 (Stats. 1891, p. 223), the title of which reads as follows: "An act to provide for the formation, government, operation and dissolution of sanitary districts in any part of the state, for the construction of sewers and other sanitary purposes; the acquisition of property thereby; the calling and conducting of elections in such districts; the assessment, levy, collection, custody, and disbursement of taxes therein; the issuance and disposal of the bonds thereof and the determination of their validity, and making provision for the payment of such bonds and the disposal of their proceeds." The powers and duties conferred upon the board of a sanitary district are as follows:

"Sec. 5. Every sanitary district formed under the provisions of this act shall have power to have and use a common seal, alterable at the pleasure of the sanitary board; to sue and be sued by its name; to construct and maintain and keep clean such sewers and drains as in the judgment of the sanitary board shall be necessary or proper, and for this purpose to acquire, by purchase, gift, devise, condemnation proceedings, or otherwise, such real and personal property and rights of way, either within or without the limits of the district, as

in the judgment of the sanitary board shall be necessary or proper, and to pay for and hold the same; to make and accept any and all contracts, deeds, releases, and documents of every kind which, in the judgment of the sanitary board, shall be necessary or proper to the exercise of any of the powers of the district, and to direct the payment of all lawful claims and demands against it; to issue bonds as hereinafter provided, and to assess, levy, and collect taxes to pay the principal and interest of the same, and the cost of laying and the expense of maintaining any sewer or sewers that may be constructed subsequent to the issuance of said bonds, or any lawful claims against said district, and the running expenses of the district; to employ all necessary agents and assistants, and to pay the same; to lay its sewer and drains in any public street or road of the county; and for this purpose to enter upon the same and make all necessary and proper excavations, restoring the same to proper condition, but in case such street or road shall be in an incorporated city or town, the consent of the lawful authorities thereof shall first be obtained; to make and enforce all necessary and proper regulations for the removal of garbage and the cleanness of the roads and streets of the district, and for the purpose of guarding against the spread of contagious and infectious diseases, and for the isolation of persons and houses affected with such diseases, and for the notification of the other inhabitants of the existence thereof, and all other sanitary regulations not in conflict with the constitution and laws of the state; to impose fines, penalties, and forfeitures for any and all violations of its regulations and orders, and to fix the penalty thereof by fine or imprisonment, or both, but no such fine shall exceed the sum of one hundred dollars, and no such imprisonment shall exceed one month; to call, hold, and conduct all elections necessary or proper after the formation of the district; to prescribe, by order, the time, mode, and manner of assessing, levying, and collecting taxes for sanitary purposes, except as is otherwise provided herein; to compel all residents and property owners within the district to connect their houses and habitations with the street sewers and drains and generally to do and perform any and all acts necessary or proper to the complete exercise and effect of any of its powers, or the purpose for which it was formed."

In 1895 the legislature passed an act to amend the sanitary law of 1891. (Stats. 1895, p. 85.) By section 1 of the amendatory act of 1895 it is sought to amend the title of the former act of 1891 by adding thereto the following: "And for empowering sanitary boards to provide in other respects for the good order and welfare of sanitary districts." Section 2 of the amendatory act of 1895 amends section 5 of the original act, set forth in full *supra*, by inserting therein the following: "To make and enforce all necessary and proper regulations for suppressing disorderly and disreputable resorts and houses of ill-fame within the district, and to determine the qualifications of persons authorized to sell liquors at retail, and from and after the passage of this act no license to keep a saloon or sell liquors at retail shall take effect or be operative within any sanitary district, unless the same be approved by the sanitary board of the district."

It is very clear that the act of 1891 conferred no power upon sanitary districts to pass an ordinance of the kind under consideration. It is claimed, however, on the part of the respondent that such power was conferred by virtue of the amendment of 1895. On the part of the petitioner it is contended, however, that said amendment of 1895 is unconstitutional and invalid. The constitution declares that "every act shall embrace but one subject, which subject shall be expressed in its title," and that "no law shall be revised or amended by reference to its title, but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended." (Const., art. IV, sec. 24.) In *Ex parte Liddell*, 93 Cal. 634, it is said: "Until a comparatively recent day the title of an act in this country was regarded as no part of it; but if the language of the act was ambiguous, the title might be considered in determining the intent of the legislature. At the present time, however, the constitutions of many states contain provisions similar to that quoted above. The object of the provision is to prevent legislative abuses—to prevent the passage of acts bearing deceitful and misleading titles. It is intended to protect the members of the legislature as well as the public against fraud; to guard against the passage of bills, the titles of which give no intimation to members of the legislature or to the people

of the matters contained therein." (See, also, Cooley's Constitutional Limitations, 6th ed., 169.)

In *People v. Parks*, 58 Cal. 625, the court had under consideration an act of the legislature entitled "An act to promote drainage." In the opinion it is said: "According to constitutional requirements for the enactment of statutory law, the title of every bill introduced into the legislature must contain the subject of legislation; and when the legislative will on that subject had assumed the form of law, its provisions must correspond with the subject of which the title is the name, standing for and representing it. The title of the act under consideration fairly indicates but one subject. As expressed in the title the whole object of the legislation is to promote drainage. Anyone, after reading the title, would naturally expect to find in the body of the act provisions for carrying that into effect as the whole object of the law, because such provisions, in view of the constitutional provisions referred to, would be necessary to give unity and wholeness to the law. Provisions of an act may be numerous; but however numerous, if they can be by fair intendment construed as falling within the subject matter of legislation, or necessary as ends and means to the attainment of the subject, the act will not conflict with the constitution. But if the act shall be found to be made of incongruous parts, or to comprehend unconnected and dissimilar subjects to that expressed in its title, it cannot be upheld." It was provided in that act for the appointment of a board of drainage commissioners, who were given power to "control debris from mining and other operations for the improvement and rectification of river channels, the erection of embankments or dikes necessary for the protection of lands, towns or cities from inundation," etc. The court held that all the subjects of the act would not naturally fall within the scope of the title. The storage of debris from mining and other operations, it was held, seemed to be a paramount object of the act, to promote drainage merely subordinate. "What the phrase 'other operations' may mean is not clear from the act itself. Under it may be concealed many subjects which are not expressed in the title; and the existence of such a phrase in the statute renders it obnoxious to the constitutional provisions under consideration." And

it was said the storage of debris, and the promotion of the drainage of a district of country, are things essentially different. The one has no necessary connection with the other.

The title to the act of 1895, amending the sanitary law of 1891, contained no intimation that the purpose of the act of 1895 was to amend the title of the former act. The title of the former act was attempted to be amended by an independent section in the act of 1895, as already shown. But even if it were permissible to amend the title of the former law in the manner attempted here, the amendment in this case does not enlarge the scope of the law at all, for "every act shall embrace but one subject, which subject shall be embraced in its title."

There is nothing in the title of the act under consideration, even as attempted to be amended, which in the remotest degree refers to the question of regulating the sale of liquors or prescribing the qualifications of persons dealing in the same. The matters enumerated in the title of the act show that it is for the formation of a sanitary district, and providing for sewers. All these matters properly fall under the meaning of the word "sanitary" or "sanitation," according to the standard authorities. A sanitary district, no more than an irrigation district, or a reclamation district, or a drainage district, possesses police powers properly belonging to cities and municipal bodies exercising local governmental functions. Such districts are created for the purpose generally of some special local improvement, and should exercise only such powers as may be conferred upon them by the legislature in the line of the object of their creation. Although in the nature of public corporations, they are not municipal corporations in the proper sense of that term. All municipal corporations are public corporations, but the converse does not follow that all public corporations are municipal. Railroad corporations are deemed *quasi* public corporations, but they are not deemed *quasi* municipal corporations. In some of the cases expressions may doubtless be found which would seem to indicate that public corporations and municipal corporations are synonymous, but it is, nevertheless, inaccurate to designate a drainage district or a sanitary district, although public corporations, as municipalities. Webster defines "mu-

nicipal" as pertaining to a city or corporation having the right of administering local government—as municipal rights, municipal officers; and "municipality" is defined as a municipal district, a borough, a city, town or village. The Century Dictionary defines "municipal" as pertaining to local self-government or corporate government of a city or town; and "municipality," as a town or city possessed of corporate privileges of local self-government; a community under municipal jurisdiction. Bouvier's Law Dictionary says "municipal" strictly applies only to what belongs to a city. Among the Romans cities were called municipia. In a general sense, we say that all law other than international is municipal law, but when we speak of corporations as municipal we mean cities or towns. These existed before the constitution. They came down to us from former times, and they have always formed an important part of our system of government. The present constitution recognizes the counties, cities, and towns theretofore formed and organized. "The several counties, as they now exist, are hereby recognized as legal subdivisions of this state. . . . The legislature shall establish a system of county government which shall be uniform throughout the state; . . . and by general laws shall provide for township organization, by which any county may organize whenever a majority of the qualified electors of such county voting at a general election shall so determine; and whenever a county shall adopt township organization, the assessment and collection of the revenue shall be made, and the business of such county, and the local affairs of the several townships therein, shall be managed and transacted in the manner prescribed by such general laws." The legislature is also required to "provide for the election or appointment in the several counties of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township, and municipal officers as public convenience may require, and shall prescribe their duties and fix their terms of office." The legislature is also required by general law to provide for the incorporation, organization, and classification in proportion to population of cities and towns, and city and county governments may be merged and consolidated into one municipal government with one set of officers, and

power is directly conferred upon cities of a certain grade to frame charters for their own government, subject to the approval of the legislature, and it is further declared; "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." (Const., art. XI, secs. 1, 4-8, 11.)

All that is said in respondent's argument as to the injurious effects upon the human system of the indulgence in alcoholic drink may be conceded, yet that does not touch the question under consideration. The question here is whether the legislature can graft upon an act designed for some local improvement, such as drainage, irrigation, or sanitary district, a subject entirely foreign to the purposes of such act, and a subject also which clearly falls within the police powers possessed by cities and other like corporations formed and organized for governmental purposes. Under the rule of construction, *Expressio unius est exclusio alterius*, the legislature has no authority to create other public corporate bodies—whether called districts or by any other name—and clothe them with the power to make and enforce local, police, sanitary, and other regulations conferred by the constitution upon counties, cities, towns, or townships. In *Woodward v. Fruitvale Sanitary Dist.*, 99 Cal. 554, the act under consideration, passed in 1891, was upheld, but it was there said: "It may well be that if in the formation of a sanitary district an incorporated city or town shall be included, in which the authority conferred upon the sanitary board is delegated to the municipality, it will be held that the law under consideration was not intended to apply to such city or town." The same result follows if the authority attempted to be conferred infringes upon the rights and powers conferred upon counties by the constitution, as well as by general law. In this case the district in question is within the boundaries of Los Angeles county, which possesses ample power to regulate the liquor traffic, and it has exercised that power, as appears in this case. It is stipulated herein that at the time of the alleged commission of the offense by the petitioner he had both a wholesale and retail license from the board of supervisors of Los Angeles county authorizing him to carry on the business of wholesaling and retailing spirituous liquors at the place where he was

charged with violating the ordinance of said sanitary district.

The amendatory act of 1895 embraces a new, separate, and distinct subject from that in the original act of 1891—a subject also which is not embraced in the title of the act even as attempted to be amended, and which subject has been delegated by the constitution to other corporate bodies, to wit, counties, cities, towns, and townships. Said amendatory act is, therefore, in conflict with the constitution and void; and the ordinance under which petitioner was convicted and is held is without authority of law and invalid.

Let the petitioner be discharged.

Temple, J., Harrison, J., and Beatty, C. J., concurred.

McFARLAND, J., concurring.—I concur in the judgment and in the foregoing opinion of Mr. Justice Van Dyke. I desire, however, to say explicitly that, in my opinion, the legislature cannot, under any circumstances, delegate to such a thing as a sanitary district the power of enacting penal legislation. That power must be confined to the municipalities mentioned in the constitution which are given police powers, etc. The constitution does not contemplate that the state should be overrun and overloaded with innumerable legislative bodies, each having power to make laws under which citizens may be sent to jail.

[S. F. No. 2196. Department One.—August 28, 1900.]

W. A. NEVILLS, Respondent, v. SAMUEL M. SHORTRIDGE and CHARLES M. SHORTRIDGE, Appellants.

PREMATURE ACTION—APPEAL FROM JUDGMENT—MOTION TO DISMISS—MERITS AND PURPOSE OF APPEAL NOT CONSIDERED.—The defendants in a premature action who have prevailed in a defense thereto have a right to appeal from a judgment of dismissal thereof which is declared to be not a bar to another action, which declaration was not in accordance with the prayer of their answer and is in form a judgment against them. Upon a motion to dismiss such appeal upon the ground that the appellants are not aggrieved, and that the

appeal is frivolous and taken for delay, the merits of the appeal, as respects the prejudicial character of the judgment or the frivolous character of the appeal and the purpose of delay, cannot be considered.

ID.—REMEDY FOR FRIVOLOUS APPEAL.—An appeal cannot be dismissed upon the ground that it is frivolous or taken merely for delay. The remedy therefor must be sought in such addition to the judgment as may be just under section 957 of the Code of Civil Procedure.

ID.—SECOND ACTION—PLEA IN ABATEMENT.—The fact that a second action has been brought for the same cause, and that the defendants have pleaded in abatement thereof the pendency of the former action by virtue of their appeal, is not a sufficient reason for dismissal of the appeal, even if such plea is well taken. Whether the appeal is sufficient to establish such plea must be determined in the second action.

MOTION to dismiss an appeal from a judgment of the Superior Court of Santa Clara County. W. G. Lorigan, Judge.

The facts are stated in the opinion.

John E. Richards, and Van R. Paterson, for Appellants.

Riordan & Lande, and James H. Campbell, for Respondent.

HARRISON, J.—Motion to dismiss the appeal.

The complaint herein seeks the foreclosure of a mortgage given to secure two promissory notes executed to the plaintiff by the defendants. In their answer the defendants, in addition to other defenses, allege that the plaintiff subsequent to the execution of the notes had extended the time for their payment, and that this time had not expired when the complaint was filed. The court found this fact in accordance with the answer, and thereupon entered judgment that the action "is hereby dismissed on the sole ground that it was prematurely brought; such dismissal, however, not to be a bar to another action, and defendants to recover their costs herein." From this judgment the defendants have appealed.

After the brief of the appellants had been filed, the respondent moved to dismiss their appeal upon the ground that, as the judgment was rendered in favor of the appellants, they are not "aggrieved." and therefore have no right of appeal. That portion of the judgment, however, which declares that the dismissal is not to be a bar to another action was not in

accordance with the prayer of their answer and is in form a judgment against them. They have, therefore, upon the face of the judgment a right to appeal therefrom. Whether this part of the judgment is prejudicial to their rights or whether it was competent for the court in this action to determine the effect of its judgment in any subsequent proceeding between the parties, are questions that involve an investigation of the merits of the judgment appealed from, and cannot be determined upon a motion to dismiss the appeal.

The respondent also urges as another reason for granting his motion that the appeal was taken for delay, and is frivolous, and in support thereof has presented an affidavit to the effect that in a subsequent action brought by him to foreclose the same mortgage, the defendants herein have pleaded in abatement thereof the pendency of the present action by virtue of this appeal. Whether this appeal is sufficient to establish such plea of abatement must be determined, however, in that action. If it does have that effect, it cannot be urged as a reason for granting the present motion to dismiss the appeal herein. An appeal, moreover, will not be dismissed upon the ground that it is frivolous, or taken merely for delay. The remedy therefor must be sought under section 957 of the Code of Civil Procedure. (*Lemon v. Rucker*, 80 Cal. 609; *Randall v. Duff*, 105 Cal. 271. See, also, *Hooper v. Beecher*, 109 N. Y. 609.)

The motion is denied.

Garoutte, J., and Van Dyke, J., concurred.

[L. A. No. 609. Department Two.—August 28, 1900.]

HOUSTON MANN, Appellant, v. ALPHA BUDLONG and
GEORGE DECK, Respondents.

MINING CLAIMS—ANNUAL WORK—TUNNEL DEVELOPING OVERLAPPING CLAIMS—RELOCATION.—Where the owner of a quartz mining claim is also the owner of another ledge, the surface ground of which overlaps the other, and has driven a tunnel into the overlapping claim to develop both ledges in good faith, the work of tunneling
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done upon the land common to both of the claims in excess of the annual work required by law is sufficient to prevent a forfeiture of the claim overlapped; and a relocation thereof by other claimants for failure to do the annual work, made while work was progressing in the tunnel, cannot be sustained.

ID.—RIGHTS OF MINING CLAIMANT—METHOD OF DEVELOPING MINE.—

Where the requisite annual work is done toward the development of a mining claim within its surface lines, a court will not be permitted to substitute its own judgment as to the wisdom and expediency of the method employed in developing the mine in place of that of the owner of the claim.

ID.—FINDING AGAINST DEVELOPMENT—INSUFFICIENCY OF EVIDENCE—

PROOF OF OVERLAPPING—ABSENCE OF CONFLICT—IGNORANT WITNESSES.—A finding that the work done in the tunnel upon the other claim did not tend to develop the claim in controversy is not sustained where the evidence shows without substantial conflict that the claims overlap, and that the work in the tunnel was actually done within the surface lines of both claims. The evidence of witnesses testifying to the contrary, who admitted upon cross-examination their ignorance of the boundaries of the claims is of no value, and is insufficient to raise a conflict.

APPEAL from a judgment of the Superior Court of Kern County and from an order denying a new trial. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

Laird & Packard, for Appellant.

Alvin Fay, E. J. Emmons, and Charles S. McKelvy, for Respondents.

HENSHAW, J.—This is an action brought by plaintiff to determine his possessory right to a certain quartz mining claim. The defendants pleaded an entry upon the land in question as vacant and unoccupied mineral land, and a compliance upon their part with the laws governing the location and working of such a claim. The land is part of a claim admittedly first located by plaintiff and called by him the Ontario mine. Defendants allege a failure by plaintiff for five years preceding the commencement of the action to do the necessary amount of work upon the claim. Their location, which they called the Rawhide mine, takes in about

two hundred feet of the southwestern end of the Ontario mine. The court's findings were against plaintiff, who appeals, insisting that there is no evidence to support them.

The validity of the location of the Ontario mine being conceded, the essential question for determination, so far as concerns plaintiff, is whether he had forfeited or abandoned his rights by a failure to comply with the law. As to this, it appears without conflict that plaintiff, besides the Ontario, owned the continuous and overlapping claim known as the Jeanette; that he was driving tunnels on the Jeanette claim for the purpose of tapping both the Jeanette ledge and the Ontario ledge. All of the work which was being done upon the Jeanette tunnels was upon land covered by the overlapping Ontario claim. The court found that the work thus performed upon the Jeanette mine did not and could not tend to develop or benefit the claim known as the Ontario mine. But if against this finding it be conceded or shown that the work was actually done upon the Ontario claim in good faith for the purpose of developing the Ontario mine, a strict compliance with the requisites of the statute is established, and a court will not be permitted to substitute its own judgment, as to the wisdom and expediency of the method employed for developing the mine, in place of that of the owner. (*Stone v. Bumpus*, 46 Cal. 221; *Lindley on Mines*, sec. 631.) We have not in this case been afforded the assistance of a brief from respondent pointing out any evidence to support these findings. Upon the other hand, appellant in challenging them makes it appear that by the evidence in the case the work done upon the Jeanette tunnels was upon the overlapping land of the Ontario. Many witnesses positively testified that the Ontario claim did overlap the Jeanette where the work of tunneling was in progress, while against this evidence but three witnesses, and two of them the defendants, testified that the Jeanette and Ontario claims do not overlap. But on cross-examination each of them declared his ignorance as to the location of the boundaries of either of the claims; and since they admitted their ignorance of the boundaries, it is manifest that their evidence to the effect that the claims did not overlap is utterly valueless, and insufficient to raise a conflict. The facts are, then, that the Jeanette and Ontario claims overlapped, and that

upon the land common to both of these claims work of tunneling was done in value largely in excess of that required by the law. The necessary amount of work thus having been done upon the Ontario claim, with the manifestly honest intent of striking the lode and developing the mine upon a definite plan, even if that plan should result in failure, it cannot be judicially said that the work contemplated by the law was not done. This work was in actual progress in the year 1895 and in 1896 at the time of defendant's entry under the claim of abandonment.

As the uncontradicted facts disclosed that the findings to this effect are not supported, the judgment which the court based upon these findings must be reversed and the cause remanded.

Temple, J., and McFarland, J., concurred.

Hearing in Bank denied.

[L. A. No. 630. Department Two.—August 28, 1900.]

W. A. CHOATE, Appellant, v. F. S. HYDE, Respondent.

VENDOR AND PURCHASER—ASSIGNMENT OF CONTRACT OF SALE—REPRESENTATION AS TO TITLE—KNOWLEDGE OF FACTS—REFORMATION—RESCISSION.—An assignment of a contract for the sale of land by a railroad company which had a patent therefor, made in consideration of the transfer of nursery stock by the assignee to the assignor, cannot be reformed or rescinded by the assignee on the ground that the assignor represented that the title was good, and that the contract did not express the understanding of the parties, if it appears that the contract to take the assignment of the contract of sale was clear and unambiguous, and fully understood by the assignee, and that both parties knew all the facts upon which the representation was based, and believed that the railroad company had a good title to the land.

ID.—EXPRESSION OF OPINION BY VENDOR—EQUAL MEANS OF INFORMATION—ABSENCE OF FRAUD.—A mere expression of opinion by the vendor as to the sufficiency of the title, if the means of information respecting it are equally accessible to both parties, or the same facts are within the knowledge of both parties, and no confidential relation exists between them, does not constitute fraud or

deceit on the part of the vendor, and does not justify the purchaser in relying thereon.

APPEAL from a judgment of the Superior Court of San Diego County and from an order denying a new trial. E. S. Torrance, Judge.

The facts are stated in the opinion of the court.

Shirley C. Ward, Eugene Daney, and S. M. Parsons, for Appellant.

J. B. Mannix, for Respondent.

HENSHAW, J.—This was an action to recover eighteen hundred and seventy-five dollars, the price of certain nursery trees, under a written contract between the parties, and also for four hundred and thirty-nine dollars as the increased value of the trees after demand upon defendant therefor. Defendant asked for a reformation of the contract, and for a rescission of it as revised. The court gave him judgment as prayed for, and from the order denying him a new trial plaintiff appeals.

The contract between the parties was as follows: "That said Choate agrees to have assigned a certain contract for the purchase of seventy-five and a fraction acres of land in San Bernardino County, California, from the Southern Pacific Railroad Company, being contract numbered ten thousand seven hundred and sixty, for seventy-five and a fraction acres . . . to said Hyde, free of all encumbrances, save the balance due on purchase price and interest to May 25, 1896, upon the execution of the bill of sale hereinafter mentioned to be given by said Hyde, and said Hyde agrees to give a bill of sale to said Choate for all the apricot nursery stock." Here follows a specific description of the trees to be given to Choate, to the value of eighteen hundred and seventy-five dollars. In seeking a reformation of this contract defendant pleaded that the intent of the parties was that Choate agreed to sell and defendant agreed to buy the land described, and not Choate's contract with the railroad to purchase the same; that the agreement was drawn without the aid of counsel by defendant himself, and that, being unversed in the law, he did not correctly set forth the understanding of the parties. For a rescission he pleaded representations by plaintiff that his title

to the land was good, upon which he had relied; that he afterward discovered that the title was not good, and demanded of plaintiff a rescission of the contract.

We are satisfied that under the evidence in this case defendant was not entitled to a reformation of the contract, and consequently was not entitled to a rescission. It appears from that evidence that plaintiff and defendant had negotiations upon the subject matter of the contract, defendant desiring to procure land, and plaintiff being willing to sell land to which he had title, or upon which he had a contract for certain nursery trees. The agreement was finally concluded touching the seventy-five acres in question. As to that land the facts were that plaintiff and his father had entered upon it, claiming it to be government land open to homestead or pre-emption; that an adverse claim to the land was asserted by the Southern Pacific Railroad Company, which contended that it was a part of its grant; that contests had been waged between this plaintiff and the railroad company concerning the title to the land, before the land office and the secretary of the interior, in every case resulting in the defeat of the plaintiff; and that, finally, a patent to the land from the government of the United States had issued to the company. Plaintiff then had secured from the company a contract to purchase the land, by which contract the railroad agreed to sell for a definite price, declining to guarantee its title, but covenanting, in case its title should not prove valid, to return the purchase price. Under this contract with the railroad company plaintiff had made certain payments. There were still moneys to be paid, both principal and interest. This was the situation when plaintiff and defendant entered into their contract, and all of this was fully explained by plaintiff to defendant before their agreement was executed. Plaintiff testified as to this matter: "After my explanation of all this trouble to Mr. Hyde, he seemed to be fully satisfied that the title to the land was in the Southern Pacific, and after that we talked altogether and always of transferring this contract, of having this contract transferred to Mr. Hyde." Defendant's own testimony is in striking harmony with this. He says:

"Q. Mr. Hyde, I understood you to say that when you first talked with Mr. Choate about this property that he told you the condition of the title; that he and his father had entered upon the land, assuming it to be government land, and they had fought the railroad company before the land office, and they had been defeated at every stage of the proceedings, and finally a patent had been issued to the railroad company? A. He told me that on the way between Colton and his ranch.

"Q. And that his evidence of title now was a contract with the railroad company? A. Yes.

"Q. He explained that to you? A. Yes, sir."

Following this conversation the contract was drawn by defendant himself, and while he pleads his inexperience in preparing such documents, a reading of the instrument discloses that it was drawn with some art. It expressly declares that Choate was to assign "a certain contract for the purchase of seventy-five and a fraction acres of land from the Southern Pacific Company . . . free of all encumbrances, save the balance due on purchase price, and interest to May 25, 1896." There is no ambiguity or uncertainty or doubt as to the meaning of this language, and as little doubt as to defendant's understanding of it. He accepted the contract as he had written it. He took the assignment of the railroad contract, had it in his possession for months, paid moneys of account of it, and only after he feared a defect in the title which he expected to receive from the railroad did he declare that the contract between himself and plaintiff did not express the true intent of the parties. He knew by Choate's own statement that Choate had no title and that he could not, therefore, contract to sell him the land with a good title. He knew that Choate believed that the railroad title was good, and he knew the grounds of Choate's belief—his defeat in his endeavors to secure the land from the government, and the issue by the government to the railroad of that august muniment of title, a patent. He could not, then, have been contracting that Choate should sell him the land, since all that he or Choate believed that the latter had to sell was his contract with the railroad for the purchase of the land. But it is urged that Choate represented to plaintiff that "his title was good," or that "the railroad title

was good." Defendant's evidence goes to this effect; but what does that prove? It is not a case where representation as to the validity of the title is made without disclosure of the facts to one who relies upon the representations. All that can be said is that, after fully and fairly informing the defendant of the exact situation as to the title, of the facts upon which he founded his belief that the railroad had title, he declare his opinion to that effect. But mere expressions of opinion as to the sufficiency of the title, when the means of information are equally accessible to both parties, or the same facts are within the knowledge of both parties, and when no confidential relation exists between them, do not constitute fraud or deceit upon the part of the vendor. It is a mere statement of opinion, and does not justify the party to whom the statement is made in relying thereon. (*Nounan v. Sutter County Land Co.*, 81 Cal. 1; Maupin on Titles to Real Estate, sec. 106.)

It is manifest, therefore, that the contract between these parties is exactly what they contemplated, and that the evidence failed utterly to support defendant's demand, either for reformation or rescission.

The judgment and order appealed from are, therefore, reversed.

Temple, J., and McFarland, J., concurred.

Hearing in Bank denied.

[Crim. No. 613. In Bank.—August 30, 1900.]

THE PEOPLE, Respondent, v. W. E. MITCHELL, Appellant.

CRIMINAL LAW—HOMICIDE—SUPPORT OF VERDICT—INSTRUCTIONS AS TO JUSTIFIABLE HOMICIDE—APPEARANCE OF DANGER.—A verdict of guilty of murder in the second degree will not be disturbed as contrary to the evidence or to the instructions of the court where there is no pretense that the defendant was in actual danger at the time of the killing, and the jury might find from the evidence that he was not actuated by a reasonable fear that the deceased was

about to kill or severely injure him when he killed the deceased, and the court gave full and correct instructions on the law of justifiable homicide and appearance of danger, and told the jury that if they had a reasonable doubt as to whether the defendant had reason to believe, as a reasonable man, that he was in danger of being killed or severely injured by the deceased at the time he shot deceased, they should acquit the defendant.

ID.—GOOD CHARACTER OF DEFENDANT—INSTRUCTION.—An instruction to the effect that the good character of the defendant for peace and quietness, if proved to the satisfaction of the jury, is to be considered in connection with the other facts of the case, and kept in view in all their deliberations, and that they are to acquit the defendant if they have a reasonable doubt of his guilt in view of all the evidence, but that if the evidence convinces them beyond a reasonable doubt of his guilt, they must so find, notwithstanding his good character, is correct, and does not imply that the evidence of good character is not to be considered in determining the question of guilt.

ID.—FAMILIARITY OF DECEASED WITH DEFENDANT'S WIFE—IRRELEVANT AND HEARSAY EVIDENCE—HARMLESS RULING.—Irrelevant evidence as to the interchange of Christmas presents between the deceased and the wife of the defendant, and hearsay evidence as to common talk and scandal coming to the ears of a witness as to the attentions of deceased to defendant's wife, were properly excluded. Their exclusion could not have harmed the defendant where it was abundantly shown without objection that the defendant had occasion to be and was jealous of the deceased, and the defendant had the benefit of whatever advantage might accrue to him from presenting to the jury the real or supposed wrong which deceased had done him in his domestic relations.

ID.—NEWLY DISCOVERED EVIDENCE—DISCRETION.—Where it does not appear that the court abused its discretion in not granting a new trial on the ground of newly discovered evidence, its order denying a new trial will not be disturbed on that ground.

APPEAL from a judgment of the Superior Court of Toulumne County and from an order denying a new trial. G. W. Nicol, Judge.

The facts are stated in the opinion of the court.

F. W. Street, and Crittenden Hampton, for Appellant.

Tirey L. Ford, Attorney General, and C. N. Post, Assistant Attorney General, for Respondent.

McFARLAND, J.—The appellant was charged with the murder of one John Sheehan, and was convicted of murder in the second degree. He appeals from the judgment and from an order denying his motion for a new trial. We will notice the five points made for a reversal.

The contention of appellant that the verdict is contrary to the evidence cannot be maintained. It was clearly shown, and is admitted by appellant, that appellant shot and killed the deceased; but he contends that the homicide was committed in justifiable self-defense. The evidence does not afford any opportunity for any pretense that appellant was in actual danger at the time of the killing; the deceased was unarmed, and had made no attack on appellant. But it is contended that the homicide occurred under such circumstances that appellant was justified in supposing that he was in danger, and that he fired the fatal shots under reasonable fear of being killed or severely injured by the deceased. There is no question in the case as to the law on the subject; the court in its own charge, and in instructions given at the request of appellant, fully and correctly stated the law as to appearances. Among the instructions asked and given was the following: "If the jury have a reasonable doubt as to whether the defendant had a reason to believe, as a reasonable man, that he was in danger of being killed or seriously injured by the deceased at the time he shot deceased, then you will acquit the defendant." The jury were also told that even if they found that the deceased was unarmed, "in the absence of proof on the subject the jury will not assume the fact to be that defendant knew the deceased was unarmed." Appellant does not complain of the instructions on this subject, and he certainly could not have expected any more favorable to him. The jury, therefore, were fully informed on this point, and could not have acted under any misunderstanding of the law on the subject. This contention of appellant, therefore, is reduced to the proposition that the evidence did not warrant the jury in finding that when he killed the deceased he was not actuated by a reasonable fear that deceased was about to kill him or to severely injure him, and that for this reason the judgment should be reversed. But this proposition is not maintainable. It is sufficient to say that the evidence relied on as support-

ing the proposition is slight and meager in the extreme, and that there is no sound reason for expecting this court to disturb the verdict on this ground. The same view must prevail as to the appellant's second point, namely; That the verdict is contrary to law because inconsistent with the court's instruction as to justifiable homicide.

There is only one objection to the instructions of the court to the jury, and that is based upon a part of the instruction as to good character. The whole instruction is as follows: "The defendant has introduced evidence before you tending to show his good character for peace and quietness. If, in the present case, the good character of the defendant for these qualities is proven to your satisfaction, then such fact is to be kept in view by you in all your deliberations, and it is to be considered by you in connection with the other facts in the case, and if after a consideration of all the evidence in the case, including that bearing upon the good character of the defendant, the jury entertain a reasonable doubt as to defendant's guilt, then I charge you it is your duty to acquit him. But if the evidence convinces you beyond a reasonable doubt of defendant's guilt, you must so find, notwithstanding his good character." The objection is to the last sentence, with respect to which counsel say: "It implies, or at least the jury could infer from that language, that they must be convinced beyond a reasonable doubt of defendant's guilt from the evidence taken in the case, excluding from their minds the evidence offered in reference to defendant's good character." This is not an admissible interpretation of the instruction. Upon this point it simply told the jury that "if, after a consideration of all the evidence in the case, including that bearing upon the good character of the defendant, . . . the evidence convinces you beyond a reasonable doubt of defendant's guilt, you must so find, notwithstanding his good character." It cannot be distinguished from an instruction on this subject approved in *People v. Smith*, 59 Cal. 607, which concludes as follows: "But if, after a full consideration of all the evidence adduced, the jury believe the defendant to be guilty of any degree of crime, they should so find, notwithstanding the proof of good character."

Appellant contends that the judgment should be reversed

because the court erred in sustaining an objection to the following question asked of one of his witnesses: "Do you know of Mrs. Mitchell putting a Christmas present on the tree for John Sheehan, and he one for Mrs. Mitchell?" and also that the court erred in sustaining objections to the two following questions asked of another witness: "Did the fact of John Sheehan's attentions to your wife become common talk and scandal, and come to your ears in that way?" and, "Did it come to your ears from many, or any, sources that John Sheehan was paying attentions to your wife after that time and visiting her?" Considering the circumstances of this case and the character of the defense, these questions were irrelevant and hearsay, and the objections to them were properly sustained. It may be remarked, however, that it was abundantly shown that appellant was jealous of the deceased, and that a great deal of evidence was introduced, without objection, which tended in a much greater degree than answers to the questions ruled out would have tended to show that there was some foundation for the jealousy. The appellant, therefore, had the benefit of whatever advantage might accrue to him by presenting to the jury the real or supposed wrong which the deceased had done him in his domestic relations.

As to the point of newly discovered evidence, it is enough to say that the showing is not sufficient to warrant us in holding that the trial court abused its discretion in not granting a new trial on that ground. (See *People v. De-masters*, 109 Cal. 608.)

The judgment and order appealed from are affirmed.

Temple, J., Henshaw, J., Garoutte, J., Van Dyke, J., Harrison, J., and Beatty, C. J., concurred.

[S. F. No. 2201. Department One.—September 1, 1900.]

S. EPHRAIM, Appellant, v. PACIFIC BANK et al., Respondents.

RECEIVER—COMPENSATION FROM FUND—EXCEPTIONS TO RULE—PERSONAL LIABILITY OF PARTIES.—As a general rule, the compensation of a receiver is primarily a charge upon the fund in his possession, and is to be paid out of that fund; but if he has gained the possession of the fund through an irregular, unauthorized appointment, or if the property taken is determined to belong to third parties, and is taken from his possession by paramount authority, or if the fund is from any cause insufficient for his remuneration, he must look for his compensation to the party or parties at whose instance he was appointed, and is entitled to hold them personally liable for the unpaid portion of the amount of compensation fixed by the court.

ID.—RECEIVERSHIP OF PROPERTY SUBJECT TO MORTGAGE—SURPLUS—LOSS OF TITLE—INSUFFICIENCY OF FUND.—A receiver of property subject to a mortgage in favor of one not a party to the action holds it subject to any judgment which may be rendered in an action to foreclose the mortgage; and the right of the receiver attaches only to the surplus, if there be any arising from the sale of the property. If there is no surplus, and the title is lost as the result of the foreclosure, there is a total insufficiency of the fund, which authorizes the receiver to look for his compensation to the parties at whose instance he was appointed.

ID.—ORDER SETTLING RECEIVER'S ACCOUNT—EXPRESSION OF LIABILITY—DISMISSAL BY PLAINTIFFS—ACTION BY RECEIVER.—It is not necessary that the order settling the receiver's account should determine or express what party is personally liable to him for the expense and compensation allowed therein; and where the property possessed by the receiver was lost as the result of the foreclosure of a mortgage, and the action in which he was appointed was thereafter dismissed by the plaintiffs at whose instance he was appointed, so that no personal judgment could be rendered against them in favor of the receiver, he may, after the settlement of his account, maintain an action against them.

ID.—PLEADING—LIABILITY OF OTHER PARTIES—MATTER OF DEFENSE—JUDGMENT UPON DEMURRER.—If the plaintiffs sued by the receiver would claim that the defendants in the original action were liable to the receiver as well as themselves, it is matter of defense to be pleaded by them. Where a demurrer to the complaint was sustained without any plea of nonjoinder of parties, and final judgment was passed upon, the question is not presented.

ID.—ADMISSION—COMPULSORY SURRENDER OF POSSESSION BY RECEIVER—RIGHT OF ACTION.—The general demurrer admitted the fact alleged that the receiver "was obliged to and did turn over the possession of the property to said purchaser" under the foreclosure sale; and it cannot be urged under the complaint that by surrendering possession instead of retaining it to enforce his claim the receiver lost his right of action.

ID.—ACTION AGAINST INSOLVENT BANK—JOINDER OF TRUSTEES.—The trustees and directors of an insolvent bank are properly joined as parties codefendant with the bank in an action by a receiver to recover the compensation fixed by the court in a former action, where the complaint of the receiver alleges that he was appointed upon the petition of the plaintiffs in the former action by the insolvent bank and others, and that it was commenced by the parties who were settling the affairs of the bank in liquidation, and that the defendants other than the bank are the trustees and directors of the corporation defendant, and as such have the custody and control of its funds and assets.

ID.—CONSTRUCTION OF PLEADING—BANK COMMISSIONER'S ACT—REQUEST OF TRUSTEES AND DIRECTORS FOR APPOINTMENT.—The complaint of the receiver is to be construed in the light of the provisions of the bank commissioners' act, and as averring in effect that he was appointed at the instance and request of the trustees and directors codefendants, as well as of the bank defendant.

ID.—PURPOSE OF JOINDER OF TRUSTEES.—Under the facts alleged the trustees of the insolvent bank were properly joined as trustees, not only that they may defend the funds of the bank against any unjust claim, but also that it may be determined whether the claim of the plaintiff is a preferred claim, and chargeable against the funds of the bank in their custody.

ID.—STATUTE OF LIMITATIONS—SETTLEMENT OF ACCOUNT—APPEAL.—The statute of limitations against the action of the receiver to recover his compensation did not begin to run until his account was settled and allowed; and for the time during which an appeal from the order of allowance was pending, the running of the statute was suspended.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

A. Everett Ball, for Appellant.

E. D. Sawyer, and Roger Johnson, for Respondents.

HARRISON, J.—In an action pending in the superior court of Madera county, wherein the defendants herein were

plaintiffs and the Madera Fruit and Land Company et al. were defendants, the plaintiff herein, at the instance of the plaintiffs in that action, was appointed as receiver of certain lands and premises described in the complaint in said action, on February 1, 1894, and thereupon entered upon his duties as such receiver. Prior to the commencement of this action the California Savings and Loan Society had commenced an action to foreclose a mortgage held by it upon the property, and on November 26, 1894, obtained a judgment of foreclosure and sale, under which the property was sold to it January 9, 1895, and there having been no redemption, the property was conveyed to it July 17, 1895, and the possession thereof turned over to it by the receiver. In the discharge of his duties as such receiver the plaintiff expended certain moneys in caring for the property, and afterward presented his account to the court for settlement, and on October 4, 1897, the court made an order settling and allowing the same. Upon an appeal taken from this order it was affirmed in this court May 27, 1899. On March 6, 1895, after the judgment and sale in the foreclosure suit, the plaintiffs in the action in which the plaintiff herein was appointed receiver dismissed the suit.

The Pacific Bank, one of the defendants herein, was by an order of its board of directors declared insolvent June 22, 1892, and on November 3, 1893, in an action brought in the superior court for San Francisco for that purpose, was by said court declared and adjudged to be insolvent, and that its affairs and business should be closed and liquidated. The defendants herein other than the Pacific Bank are the trustees and directors of said corporation, and as such have the custody and control of its funds and assets. August 6, 1898, they had in their possession and under their control enough of said funds and assets to pay the claim of the plaintiff, and on that day were notified by him of his said claim, and that it was a preferred claim, and that they should retain a sufficient amount to pay the same.

To the complaint setting forth the foregoing facts the defendants demurred, and, their demurrer having been sustained, a judgment was entered against the plaintiff, from which he has appealed.

It is urged by the respondents, in support of their demurrer and of the judgment thereon, that inasmuch as the court did not designate the persons by whom the expenses of the receivership should be paid, the only remedy of the receiver was to collect them out of the property of which he was placed in charge, and that, having failed to collect them in this manner, he has no right of action therefor against the parties to the suit. It is unquestionably the general rule that the costs of a receivership are primarily a charge upon the fund in his possession, and are to be paid out of that fund. But it is by no means the rule that a receiver must in all cases look to that fund for his reimbursement, and has no other remedy if for any reason that fund is not available. Mr. Beach says (Beach on Receivers, sec. 773): "But it may sometimes happen that a direct liability is imposed upon the parties to the action, or upon some of them, for the remuneration of the receiver. This may result from the irregularity of the appointment, or from the insufficiency of the fund, or out of the agreement between the parties." And again, in section 774: "The rule that the compensation of a receiver is a charge upon the fund in his hands has been held not to apply without qualification to the case where the appointment was irregularly made and is vacated." If he has taken property into his custody under an irregular, unauthorized appointment, he must look for his compensation to the parties at whose instance he was appointed, and the same rule applies if the property of which he takes possession is determined to belong to persons who are not parties to the action, and is taken from his possession by paramount authority. As to such property his appointment as receiver was unauthorized and conferred upon him no right to charge it with any expenses. (High on Receivers, sec. 796; *Lammon v. Giles*, 3 Wash. Ter. 117; *Joslyn v. Athens etc. Co.*, 43 Minn. 534; *Highley v. Deane*, 168 Ill. 266; *Myres v. Frankenthal*, 55 Ill. App. 390; *Heffron v. Knickerbocker*, 57 Ill. App. 336; *Knickerbocker v. McKindley Coal etc. Co.*, 67 Ill. App. 290; *Howe v. Jones*, 66 Iowa, 156; *Tome v. King*, 64 Md. 166.)

It appears from the complaint herein that at the time of the appointment of the plaintiff as receiver the property of which he was placed in charge was subject to the lien of a

prior mortgage. It does not appear that this mortgage was a party to the action in which he was appointed receiver, and it does appear that at the time of his appointment an action was pending for the foreclosure of this mortgage. The receiver, therefore, took the property subject to the judgment to be rendered in that action. The mortgagee therein was entitled to the full payment of his judgment out of the proceeds of the sale thereunder, and the right of the receiver attached only to the surplus. If there should be no surplus, there was an "insufficiency of the fund," which authorized him to look to the parties in the action for his remuneration. In *Howe v. Jones, supra*, the receiver was appointed after judgment in aid of its execution, and took into his possession certain notes and mortgages for collection. Thereafter an intervention was filed by certain parties claiming to be the owners of the notes, and their right thereto was established. In the meantime the receiver had collected the notes, and upon the settlement of his account the trial court had authorized him to retain from the amount in his hands the costs and expenses incurred by him while acting as receiver. Upon appeal this order was reversed, the supreme court saying: "The receiver is entitled, perhaps, to be compensated for his services and to be reimbursed for his expenses, but for this he must look to the party at whose instance he was appointed." In *Knickerbocker v. McKindley Coal etc. Co., supra*, a receiver had been appointed in a suit for the dissolution of a partnership, and the property of which he was placed in charge was sold under a decree foreclosing a trust deed that had been executed prior to his appointment, and the property turned over to the purchaser. In affirming an order directing the plaintiff to pay certain expenses that had been incurred by the receiver in discharge of his duties, the court said: "While the estate in the receiver's hands is the primary fund out of which his proper expenses and compensation are to be paid, if the estate be insufficient or fail, the parties for whom he has acted may be compelled to pay the expenses incurred for their benefit. In *Tome v. King, supra*, trustees for second mortgage bondholders filed a bill of foreclosure without making the first mortgagees parties, and at their instance a receiver was ap-

pointed who took possession of the property for the second mortgage bondholders. A decree was entered for the sale of the property subject to the first mortgage. The sale under this decree did not realize enough to pay the amount allowed by the court as compensation to the receiver, and the court made an order for the payment of the deficiency by the first mortgage bondholders. This order was reversed upon appeal, upon the ground that the receiver was appointed at the instance of the second mortgage bondholders, and that, as the sale was made exclusively for their benefit, the holders of the first mortgage bonds could not upon any principle of justice or reason be compelled to pay the expenses or the commissions of the receiver, the court saying: "If the fund in court be not sufficient to afford adequate compensation and indemnity to the receivers, the parties at whose instance they were put upon the property should be required to provide the means of payment."

It was not requisite that the court should determine in its order settling the receiver's account who was liable to him for these expenses. (See *Joslyn v. Athens etc. Co.*, *supra*.) The plaintiffs had dismissed the suit, and there was no action pending in which a judgment could be rendered against anyone in favor of the receiver. Upon the appeal from the order settling his account it was held (*Pacific Bank v. Madera Fruit etc. Co.*, 124 Cal. 525) that the dismissal of the action did not discharge him from his position as receiver, or deprive the court of jurisdiction to settle his account. As the action in which he had been appointed had been dismissed, his remedy, after the court had settled his account, was to proceed by action against the parties at whose request he had incurred the expenses. (*Hutchinson v. Hampton*, 1 Mont. 39.) In *Cutter v. Pollock*, 7 N. Dak. 631, after it had been held that the action in which the receiver was appointed could not be maintained, and that his appointment was therefore unauthorized, the court held that the defendant in the action whose property had been taken by the receiver, was entitled to be reimbursed by the plaintiff, at whose instance the appointment had been made, for the costs of the receivership paid by him. If the defendants herein would claim that the liability for these expenses is against the defendants in the original action, as well as

themselves, it is a matter of defense to be pleaded by them. There is no demurrer on the ground of nonjoinder of parties defendant.

The suggestion of the respondents that the receiver was entitled to retain possession of the property as a security for the expenses incurred by him, and that by surrendering it without enforcing his claim he lost his right of action, is sufficiently met by the allegation in the complaint that after the execution of the deed under the foreclosure sale "he was obliged to and did turn over the possession of the property to said purchaser." Upon the demurrer the fact thus alleged is to be considered as admitted.

The plaintiff was authorized to include as defendants herein the defendants other than the Pacific Bank. The bank had been adjudged to be insolvent under the provisions of the bank commissioners' act, and was in liquidation. Under the provisions of that act no attachment or execution could be levied upon any property of the corporation, and the bank was enjoined from the prosecution of any further business except in liquidation, and while it is in process of liquidation the directors, under the provisions of the same act, are permitted to continue the management of its affairs under the direction of the bank commissioners. The complaint alleges that the plaintiff herein was appointed receiver upon the petition of the plaintiffs in the action against the Madera Fruit and Land Company and that that action was commenced by the parties who were settling the affairs of the bank in liquidation, and that the defendants other than the bank are the trustees and directors of the corporation defendant herein. In view of the provisions of the bank commissioners' act, this is equivalent to an averment that he was appointed at the instance of these defendants, as well as of the bank. It is further alleged in the complaint "that said defendants other than said corporation defendant are the trustees and directors of said corporation defendant, and as such have the custody and control of its funds and assets." Under these facts the trustees were properly made defendants in the action, not only that they might protect the funds of the bank in their hands against any unjust claim that might be asserted against it, but also that it might be determined whether the plaintiff's claim is a preferred claim, and that

whatever claim he may establish in his favor should be charged against the funds of the bank in their custody.

The statute of limitations would not begin to run against the plaintiff's claim until his account had been settled and allowed, and the time during which the appeal from the order of allowance was pending would suspend the running of the statute.

The judgment is reversed, and the superior court is directed to enter an order overruling the demurrers and giving to the defendants a suitable time to answer the complaint.

Van Dyke, J., and Garoutte, J., concurred.

[L. A. No. 896. Department Two.—September 4, 1900.]

DAVID E. GRIFFITH, Appellant, v. M. LEWIN, Administrator of the Estate of John M. Hughes, Deceased, Respondent.

ESTATES OF DECEASED PERSONS—VERIFICATION OF CLAIMS.—A substantial compliance with the requirements of the statute respecting the verification of claims against estate of deceased persons is sufficient.

ID.—RECITALS OF INDEBTEDNESS IN AFFIDAVIT.—Where a claim against the estate of a deceased person contains a copy of the promissory note on which it is founded, and states that no part thereof has been paid, except a specified amount, and that a specified balance is due for principal and interest to a given date, an affidavit thereto reciting that such balance is justly due to the claimant up to such date, that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of the affiant, is a sufficient compliance with the statute, although the date of the verification is subsequent to the date to which such balance referred.

APPEAL from a judgment of the Superior Court of San Luis Obispo county. E. P. Unangst, Judge.

The facts are stated in the opinion.

Jones & O'Donnell, and Graves & Graves, for Appellant.

F. A. Dorn, and S. M. Swinnerton, for Respondent.

COOPER, C.—This action was brought to recover \$879.90 balance due on a promissory note made by defendant's intestate. Upon the first trial the court below found that the note had been fully paid, and ordered judgment for defendant. This judgment was reversed here upon the ground that the evidence was insufficient to sustain the finding, and the cause was remanded for a new trial. (*Griffith v. Lewin*, 125 Cal. 618.) Upon a retrial the court found that the note has not been paid, and that all the allegations of the amended complaint are true, except the allegation that the claim upon the promissory note was properly presented to the administrator. In regard to the claim the court found that it was presented, giving a correct copy thereof in the findings, but as a conclusion of law found that such claim was insufficient in this, that it was not properly verified. Judgment was accordingly entered for the defendant, and this appeal is from the judgment upon the judgment-roll. The sole question to be determined is the sufficiency of the affidavit to the claim presented to defendant. In the finding, after setting forth a literal copy of the claim, the court finds that the verification was as follows:

"State of California, }
County of Contra Costa. } ss.

"David E. Griffith, being duly sworn, deposes and says that he is the creditor whose foregoing claim is herewith presented to the administrator of the estate of said deceased; that the amount of said claim, to wit, the sum of \$849.20, eight and and forty-nine 20-100, is justly due to the said claimant, up to Dec. 22, 1895; that no payments have been made thereon which are not credited, and that these are no offsets to the same to the knowledge of said affiant.

"DAVID E. GRIFFITH.

"Subscribed and sworn to before me, this 4th day of January, A. D. 1896.

"[Seal]

SAMUEL BROWN,

"Notary Public, County of Contra Costa."

We think the affidavit was sufficient. A substantial compliance with the statute is all that is required. (*Hall v. Superior Court*, 69 Cal. 79; *Davis v. Browning*, 91 Cal. 604; *Warren v. McGill*, 103 Cal. 155; *Landis v. Woodman*, 126 Cal. 455.)

It is admitted that the affidavit follows the words of the statute, except that the words "up to Dec. 22, 1895," are added after the statement that \$849.20 is justly due to said claimant. It is claimed that the words have the effect of making the affidavit state that \$849.20 was due December 22, 1895, and that it does not state that anything was due January 4, 1896, when the affidavit was made. There is no merit in this contention. The claim contains a copy of the promissory note, and states that no part thereof has been paid, except \$671.75. That the principal and interest due up to December 22, 1895, is \$849.20. The words "up to Dec. 22, 1895," evidently refer to the computation in the body of the claim. The language of the verification is in the present tense—that the sum "is justly due" and "that there are no offsets to the same to the knowledge of said affiant."

The judgment should be reversed and the cause remanded to the court below, with directions to enter judgment upon the findings in favor of plaintiff for the amount of said claim, and interest up to the date of judgment.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded to the court below, with directions to enter judgment upon the findings in favor of plaintiff for the amount of said claim, and interest up to the date of judgment.

Temple, J., Henshaw, J., McFarland, J.

[Sac. No. 814. Department Two.—September 4, 1900.]

**BOARD OF EDUCATION OF CITY OF WOODLAND,
Appellant, v. BOARD OF TRUSTEES, etc., Respondent.**

TAXATION—SUPPORT OF HIGH SCHOOL—ESTIMATE BY HIGH SCHOOL BOARD—POWER OF CITY TRUSTEES—CONSTRUCTION OF CODE.—Under subdivisions 14 and 15 of section 1670 of the Political Code, providing that the high school board shall furnish to the authorities, whose duty it is to levy taxes, “an estimate of the amount of money required for conducting the school for the school year,” and making it the duty of the board of trustees of a city, to whom the estimate is made, to levy a special tax “sufficient in amount to maintain the high school,” the power or discretion is vested in the board of trustees as the taxing body to determine what amount will be sufficient for the purpose, and they are not concluded by the estimate made by the high school board.

ID.—SUPPORT OF COMMON SCHOOLS—LEGISLATIVE POWER OF TRUSTEES—MUNICIPAL CORPORATIONS ACT—DIRECTORY STATUTE.—Subdivision 8 of section 798 of the municipal corporations act, providing that the board of trustees is to add to the levy of taxes for city purposes “the amount so found [by the board of education] to be required,” is to be construed as directory only, and as not restricting the legislative functions of the board of trustees of the municipality to determine the amount of money to be raised by taxation for school and other municipal purposes.

ID.—CONSTRUCTION OF CONSTITUTION—MAXIM—POWER OF TAXATION BY “CORPORATE AUTHORITIES.”—Under article XI, section 12, of the constitution of this state, providing that “the legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes,” the words “corporate authorities thereof” are to be construed distributively—*reddendo singula singulis*—as referring to the governing body of each of the several municipalities and quasi municipalities referred to in the section, and as importing the legislative department of the municipality only, in which is intended to be vested the legislative power of taxation for all municipal purposes.

ID.—SCHOOL DISTRICTS—CLASSES DISTINGUISHED—QUASI MUNICIPALITIES UNDER CODE—QUERY.—Under the municipal corporations act, in cities of the first five classes, the educational department has no legislative power, but that is vested in the legislative council or

board of trustees of the city; but all other cases are governed by the Political Code under which the city territory with its inhabitants constitutes a school district, which is a public corporation, or *quasi* municipality, governed by "boards of education," having the same functions as the "boards of trustees" of country school districts. Whether this distinction of classes is constitutionally valid is a question suggested, but not decided.

APPEAL from a judgment of the Superior Court of Yolo County. Matt. F. Johnson, Judge presiding upon hearing of petition for *mandamus* and sustaining demurrer thereto. E. Caddis, Judge rendering final judgment appealed from.

The facts are stated in the opinion of the court.

Hudson Grant, for Appellant.

W. A. Anderson, for Respondent.

SMITH, C.—Application for writ of *mandamus* requiring the defendant to levy taxes for the support of the common schools of the Woodland school district, and for the support of the Woodland high school. Judgment was rendered for defendant on demurrer to the petition, and plaintiff appeals.

Woodland is a city of the fifth class, organized under the provisions of chapter VI of the municipal corporation acts of 1883.

The Woodland school district—as authorized by the provisions of section 795 of the act, as amended in 1891 (Stats. 1891, p. 28)—includes a large territory outside the city, which is regarded for school purposes as part of the city. The district is governed by the board of education of the city, whose powers and duties are prescribed by section 798 of the act.

The woodland high school was organized in and for the Woodland school district under the provisions of section 1670 of the Political Code, and, under the seventh subdivision of the section, is governed by the board of education of the city—constituting, *pro hac vice*, the "high school board," whose powers and duties are prescribed by the tenth and following provisions of the section.

Under the provisions of the statutes cited it is made the duty of the board of education in either case—i. e., whether

acting as such, or as high school board—to make out and present to the board of trustees, on or before a prescribed date, an estimate of the amount of money required for the schools, or the high school, as the case may be. Estimates were accordingly made, both for common schools and for high school, and presented to the defendant—the amounts estimated being, for common schools seven and one-half cents, and for the high school eighteen cents, on the one hundred dollars. The actual levy made by the board of trustees was, for the former, one-quarter of one cent on the one hundred dollars, and for the latter ten cents.

The question presented for consideration is, in each case, whether it was the duty of the board of trustees to levy the whole amount estimated. Two questions are therefore presented—the one relating to the duty of the trustees with regard to the high school, the other to its duty with regard to the common schools of the district.

The High School Tax.

The question with relation to this tax turns upon the construction of subdivisions 14 and 15 of section 1670 of the Political Code. By the former subdivision, it is provided it shall be the duty of the high school board “to furnish to the authorities whose duty it is to levy taxes, on or before the first day of September [of each year] . . . an estimate of the amount of money required for conducting the school for the school year”; and, under subdivision 15, on receipt of the estimate it becomes the duty of the board of trustees—as the body “whose duty it is to levy taxes in [the] . . . school district”—“to levy a special tax upon all the taxable property of said . . . school district. . . sufficient in amount to maintain the high school.”

The language here used is susceptible of only one construction. The duty imposed is to levy a tax sufficient to maintain the school; which necessarily vests in the taxing body (in this case the board of trustees) the power or discretion to determine what amount will be sufficient for the purpose. Accordingly it was so held in *People v. Lodi High School Dist.*, 124 Cal. 694.

This construction is rendered the more apparent upon com-

paring the act with the act of March 21, 1891 (Stats. 1891, sec. 4, p. 183), of which it is amendatory. Under that act the county superintendent of schools was required to make and certify to the board of supervisors an estimate of the amount required for the high school; and it was made the duty of the board "to levy such a rate as [would] produce the amount estimated to be necessary for such purpose"—"thus leaving the amount of the tax wholly to the discretion of an executive officer, and leaving no discretion in the board." (*McCabe v. Carpenter*, 102 Cal. 469.) It was held, in the case cited, that this was in conflict with section 1, article III, and section 12, article XI, of the constitution, and therefore void. Obviously—as said in *People v. Lodi High School Dist.*, *supra*—the object of the code provisions was "to obviate[this] infirmity in the law of 1891," and to make the law conform to the constitution.

Two arguments to the contrary are, however, advanced which are worthy of consideration. The first is that, in subdivision 17 of section 1670 of the Political Code, it is provided that, in case the proper authorities should fail to levy the tax as provided in subdivision 15, "it shall be the duty of the county auditor to make such levy, and add it to the tax-roll of said city. . . . [or] school district." The term "levy," it is contended, as used here—and consequently as used in subdivision 15—must be construed as referring only "to the ministerial acts necessary to be performed in assessing and collecting taxes, and not to the legislative determination of the amount to be raised." Otherwise, it must be admitted, on the authority of *McCabe v. Carpenter*, *supra*, the power conferred upon the auditor would be unconstitutional. But the language used in subdivision 15 is too clear to be construed otherwise than as vesting in the board of trustees the power to determine the sufficiency of the tax required; and, if the term "levy" is to be construed in the same sense in both sections, it must be inferred that it was the intention of subdivision 17 to confer upon the auditor the same function.

Again, it is urged that from the peculiar nature of the school district in this case—as organized under section 795 of the municipal corporations act (Stats. 1891, p. 28)—the

function of levying the tax cannot constitutionally be vested in the board of trustees. For it is a cardinal principle "that taxes are a grant of the people who are taxed, and the grant must be made by the immediate representatives of the people" (Cooley on Taxation, 41) ; and here the people of the part of the district lying outside the city have no part in the election of the trustees, and hence are not represented by them. This objection, it is argued, does not lie to the board of education, whose members are elected by the people of the whole district, and which could, therefore, be vested with the power of taxation. But here—even if it be admitted that such power could be conferred on the board of education—there is nothing in the act to indicate such an intention on the part of the legislature; but, on the contrary, the power is expressly conferred on the board of trustees. There is, therefore, no room for inference from the objection urged to the constitutionality of the act as thus construed. Nor is it necessary for us to determine the question of constitutionality; as so far as the plaintiff's case is concerned, the result must be the same, however that question may be determined.

The Common School Tax.

The remaining question in the case relates to the duty of the board of trustees as to the levy of the tax for the support of the common schools of the Woodland school district.

On this point it is contended that, by subdivision 8 of section 798 of the municipal corporations act, the function of determining the amount of the tax to be imposed is vested in the board of education, and that the function of the board of trustees is simply the ministerial one of adding to "the amounts to be assessed and collected for city purposes.... the amount so found [by the board of education] to be required."

The same question substantially was presented in the case of *Board of Education etc. v. Board of Trustees*, 96 Cal. 42; and it was there determined that "the language of the statute," in a provision substantially the same as the provision here involved, "although imperative in terms, must be regarded as directory rather than mandatory," and "that it was not intended to take from the board of trustees the power or

right of determining the amount of money that should be raised by taxation for school purposes in any one year." There are some circumstances peculiar to that case that are alluded to in the decision as confirmatory of the conclusion reached, but the grounds of the decision were in effect that the board of trustees, being "the legislative department of the city government," and as such having the "general charge of the welfare of the city," was to be deemed to have the exclusive right of determining the amount of money to be raised by taxation for school and other municipal purposes; and these grounds are equally applicable to the case at bar.

Here, indeed, the case is stronger. The Sacramento case involved the construction of statutes antedating the constitution of 1879, but the present case must be governed by the provisions of that instrument, if any there be that apply to it. One of these, I think, strongly confirms the reasoning of the court in that case. By article XI, section 12, the legislature is forbidden "to impose taxes upon counties, cities, etc., or other public or municipal corporations, . . . but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." These provisions apply to all kinds of "public or municipal corporations," or, we may say, to all municipalities and *quasi* municipalities. These differ greatly in their organization. In some, as in cities generally, the powers of the government are distributed—as in the state government (Const., art. III)—into separate departments; in others, all the powers of the municipality are vested in one body—as, e. g., in the board of supervisors of a county, the board of trustees of a school district, etc. In the latter case the board of supervisors or board of trustees, or other governing body, constitutes the "corporate authorities" of the municipality, in which may be vested the power to impose taxes; in the former, "reading the proviso distributively—*reddendo singula singulis*"—the expression "corporate authorities" must be construed as referring to the "legislative department" of the municipality only. (*Wells, Fargo & Co. v. Board of Equalization*, 56 Cal. 198.) Accordingly this was the view of the constitution in *McCabe v. Carpenter*, *supra*—the argument being that, "since the power to levy a tax is purely legislative, it would seem to

follow that the power cannot be vested in any other authority of the local corporation than the body in which is vested [its] legislative power."

In cities of the first five classes, organized under the municipal corporations act, there is a fourth department entitled the "educational department," the functions pertaining to which are vested in the "boards of education." (Municipal Corporations Act, secs. 247, 410, 570, 670, 795.) But the powers of these boards cannot be supposed to include legislative powers for these, in cities of the first four classes, are vested—without limitation or exception—in the "municipal," or "city," or "common council," and in cities of the fifth class, in the "board of trustees." These constitute, respectively, the "legislative departments" of the cities organized under the act; and in them is vested, not only the general power of legislation, but the power of levying taxes for all municipal purposes. (Municipal Corporations Act, secs. 40 et seq., 319 et seq., 520, 524, 620, 640, 760, 764.) Hence the board of education of such a city must be regarded as a purely executive or administrative body, and therefore as incapable of exercising the power of "imposing taxes." But to construe the language of subdivision 8, section 798 (and similar provisions), of the act as mandatory would be to vest in the board the taxing, which is part of the legislative power, which obviously was not intended. The language used must therefore be held—as in the Sacramento case—to be directory only.

This conclusion, it will be observed, relates only to cities of the classes specified, organized under the municipal corporations act. It must not be extended, therefore, in its application, beyond such cities and other cities similarly organized. In this regard cities are to be divided into two classes, namely, those governed by the provisions of the Political Code, establishing a system of common school (Pol. Code, c. III, tit. III, pt. III), and those of the first five classes organized under the municipal corporations act, or under special charters containing similar organic provisions.

Under the code system the city territory, with its inhabitants, constitutes a mere "school district" (Pol. Code, secs. 1576 et seq.), and hence is a corporate body or *quasi* municipality, distinct from the municipal corporation or city, and

in no way different from the country district in nature or function. (*Hughes v. Ewing*, 93 Cal. 414; *McCabe v. Carpenter*, *supra*.) Such districts are indeed governed by "boards of education," instead of the "boards of trustees" of the country districts (Pol. Code, secs. 1593 et seq., 1616, 1617); but the former expression "is but another term for" the latter, and the difference is but in name. (*Kennedy v. Miller*, 97 Cal. 434.) Both classes of boards and both classes of school districts derive their corporate existence and functions exclusively from the provisions of the Political Code cited. Hence, as held in *Hughes v. Ewing*, *supra*, the power of imposing taxes for school purposes may, without constitutional objection, be vested in the electors of the school district, or, perhaps, in the representative body—whether called "board of trustees" or "board of education."

But with the other class of cities it is different. These, too, are sometimes said to constitute "school districts" (Municipal Corporations Act, secs. 570, 795), and are governed by "boards of education," but these terms are used in quite a different sense from that given to them in the Political Code. For here—as we have seen—the "school district" is no longer a separate corporate body, but is merged in the city, and the board of education is but a department of the general city government. Otherwise, the subject of schools would not be embraced in the title of the act, which relates merely to "the organization, incorporation, and government of municipal corporations," and includes the school system of the city only on the hypothesis that it is part of the municipal organization. On any other hypothesis the subject of schools would be omitted from the title, and the provisions relating to schools unconstitutional. (Const., art. IV, sec. 24.)

Whether the provisions of the municipal corporations act, thus withdrawing cities of the classes specified from the operation of the general system of common schools established by the Political Code, are constitutionally valid, is a grave question, but, under the view we have taken of the case, one we need not consider. (*Kennedy v. Miller*, *supra*; *San Diego v. Dauer*, 97 Cal. 442; *Kennedy v. Board of Education*, 82 Cal. 483.) But, assuming the validity of the act, it is at least

clear—to repeat the conclusion already arrived at—that the board of education of a city organized under this act must be regarded, not as an independent municipality, or *quasi* municipality, but as a component part of a municipality of which the legislative power is vested in another body, and, therefore, as incapable of exercising legislative functions. We are, therefore, of the opinion—without passing on the question of the validity of the act—that the language used in subdivision 8, section 798, of the municipal corporations act relating to the board of trustees must be regarded as directory only.

We advise that the judgment appealed from be affirmed.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Temple, J., Henshaw, J., McFarland, J.

Hearing in Bank denied.

[Sac. No. 667. Department Two.—September 4, 1900.]

EDWARD T. PURSER, Appellant, v. JARVIS E. BAKER
and ELIZA A. BAKER, Respondents.

CONTRACT FOR WATER FOR IRRIGATION—PRICE PER ACRE—CONSTRUCTION OF CONTRACT.—A contract to supply water for irrigation at the rate of two dollars per acre for the use of so much water as may be necessary for the reclamation and permanent irrigation for the annual production of crops upon a tract of one hundred and sixty acres, which provides that if there is not a sufficient supply of water and the crops fail no sum shall be paid, is to be construed as providing only for a price of two dollars per acre for so much of the land as is irrigated, and not for the entire tract without regard to the extent of irrigation.

ID.—COMPLAINT FOR WATER FURNISHED AND DELIVERED ON PART OF TRACT—FINDINGS—APPEAL—PRESUMPTIONS.—Under a complaint alleging that water was furnished and delivered on a certain part of the acreage of the tract at two dollars per acre, findings upon issues joined setting forth a less number of acres upon which water was furnished and delivered are conclusively presumed to be true upon appeal by the plaintiff from the judgment on the judgment-roll. Upon such appeal all presumptions are in favor of the judg-

ment, and it cannot be presumed that plaintiff was injured by the failure of the defendants to irrigate more land than is specified in the findings, or to use water upon the entire tract.

APPEAL from a judgment of the Superior Court of Lassen County. Stanley A. Smith, Judge presiding.

The facts are stated in the opinion.

Goodwin & Goodwin, for Appellant.

E. V. Spencer, and H. D. & G. S. Burroughs, for Respondents.

COOPER, C.—Appeal from judgment on the judgment-roll. The action was brought to recover of defendants the amount due for water furnished by plaintiff to defendants under certain written contracts, and to have the amount declared to be a lien upon the lands of defendants. The plaintiff recovered judgment and the amount was declared to be a lien upon the lands of defendants, but plaintiff claims that the judgment is not for the amount due according to the contracts, and hence this appeal. Plaintiff contends that his contract was to furnish water for all defendants' lands—one hundred and sixty acres—at one dollar per year per acre, while defendants contend that they were to pay only one dollar per acre for the number of acres irrigated and upon which water was used by them. This presents the only question in the case. The findings show that Clinton C. Hutchinson and Benjamin Leavitt, on the twenty-fourth day of September, 1891, entered into three contracts (which were intended to cover the same matter, and which may for the purposes of this case be treated as one) with Eliza A. Bogle, who was then the owner of the land now owned by defendants, by the terms of which they were to furnish said Bogle "so much of the surplus waters of Susan river as is or may be stored within the Hutchinson and Leavitt irrigation system . . . as may be necessary for the reclamation of, and permanent irrigation for, the annual production of crops on the tract of land described . . . and to be used only for the reclamation and permanent irrigation of said land aforesaid. . . . That the party of the second part hereby agrees to receive water annually from the party of the first part for the irrigation of the above-described land

. . . . and to pay therefor annually on the first day of December the sum of two dollars per acre for the use of water on the above-described land. . . . Said water shall be used by the party of the second part for no other purpose than for the irrigation of said land and for domestic purposes on said land during the irrigation thereof, nor shall the party of the second part be required to pay any sum for the use of water for the year or years of crop failure by reason of an insufficient supply of water." On the same day and as a part of the same contract the said Hutchinson and Leavitt, by a separate instrument in writing, set aside and granted to said Bogle the right to one-half the water rent to become due under the said contract.

The plaintiff has succeeded to the right of Hutchinson and Leavitt, and defendants have succeeded to the rights of said Bogle under the contract. We think the court below placed the correct interpretation upon the contract, and that defendants are bound only for the number of acres upon which they used water. The contract was for irrigation for the annual production of crops. The sum of two dollars per acre was to be paid for the use of water on the land. If there was not a sufficient supply of water and the crops should fail no sum should be paid. The amount to be paid annually was fixed by the acre. The acre was the unit of value, and this multiplied by the number of acres upon which the water was used, would fix the amount to become due under the contract. If it had been intended to be a contract for two dollars per acre for one hundred and sixty acres the contract would have said three hundred and twenty dollars per year, or two dollars per acre for one hundred and sixty acres, but instead it said "two dollars per acre for the use of water."

This was clearly the interpretation given by counsel for plaintiff upon the contract in drafting their amended complaint, for therein they allege that plaintiff has "furnished and delivered water to defendants as therein agreed upon all that portion of said land lying east and north of plaintiff's main canal, and amounting to one hundred and thirty-seven and sixty one-hundredths acres," and the prayer of the complaint is for two dollars per acre for one hundred and thirty-

seven and sixty one-hundredths acres. But regardless of the interpretation of the contract this judgment would have to be affirmed. The court found that plaintiff, "during the years 1893, 1894, 1895, and 1896, and whenever required by defendants so to do, furnished them water to sufficiently and thoroughly irrigate all the said land which they had under cultivation, and for which they required water. That during the year 1893 defendants used water upon twenty three (23) acres of said land; during the year 1894 upon thirty-three (33) acres of said land; during the year 1895 upon forty (40) acres of said land, and during the year 1896 upon sixty-four (64) acres of said land."

This finding on this appeal is conclusively presumed to be true. It is not found that plaintiff was ready or willing to furnish water for any more lands than named in this finding. Neither is it alleged nor found that plaintiff has been in any way damaged by the failure of defendants to use water upon the entire one hundred and sixty acres. It may be that the water that plaintiff never delivered was sold by him for much more than the contract price to other parties. Here all presumptions are in favor of the judgment of the lower court. No error to the injury of plaintiff appears from this record.

We advise that the judgment be affirmed.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed.

Temple, J., McFarland, J., Henshaw, J.

[S. F. No. 2054. Department Two.—September 4, 1900.]

WILLIAM LOUGHER, Respondent, v. A. J. SOTO, County Auditor of Contra Costa County, Appellant.

COUNTY GOVERNMENT—COMPENSATION OF CONSTABLES—CHANGE OF TOWNSHIP—CONSTRUCTION OF STATUTE.—Subdivision 14 of section 183 of the County Government Act, providing for salaries in addition to fees of constables in townships numbered 1 to 10 in counties of the twenty-sixth class, is to be construed as referring only to a subsisting system of ten townships so numbered, and not as ap-

plying to any part of a changed system of sixteen townships, notwithstanding a portion of the new townships may bear the same number and cover the same territory as before.

Id.—CONSTITUTIONAL LAW—SPECIAL LEGISLATION—MANDAMUS.—Such provision for the salaries of constables is special legislation, in contravention of the constitution, in not providing for all of the townships and officers of any changed system, whether it be construed as referring to those townships in the changed system bearing the same number as before or not. In either aspect, *mandamus* will not lie to compel the payment of a salary provided for a numbered township having the same number and covering the same territory in both systems.

APPEAL from a judgment of the Superior Court of Contra Costa County. Joseph P. Jones, Judge.

The facts are stated in the opinion.

C. Y. Brown, District Attorney, for Appellant.

H. V. Alvarado, for Respondent.

SMITH, C.—The case is a proceeding for *mandamus* to the defendant requiring him to issue to the plaintiff a warrant for ten dollars, his salary for the month of April, 1899, as constable of township No. 7, Contra Costa county. The plaintiff had judgment in the court below.

The case involves the construction and validity of section 183, subdivision 14 of the County Government Act of 1897; which provides in effect that the constables of townships Nos. 1 to 10, inclusive, of counties of the twenty-sixth class (which includes Contra Costa only) shall receive as compensation for services—in addition to fees, etc.—certain salaries; and, among others, the “constables of township No. 7, ten dollars per month.”

To apprehend the questions involved it should be premised that at the date of the passage of the act—April 1, 1897—there were in existence in the county of Contra Costa two systems of townships—the one in actual operation but to expire with the terms of the incumbent officers in January, 1897, by which the county was divided in ten townships; the other, established by order of the board of supervisors of date August 3, 1896, and to go into effect on the

termination of the old system, under which there were sixteen townships, of which five (including No. 7) corresponded in name and territory with those of the old system. The plaintiff, who was elected at the general election of 1898, holds office under the new system.

It is claimed by the appellant's counsel that the act must be construed as referring to the latter system; and his position is, that as it provides for only ten of the sixteen townships, it is in contravention of section 25, subdivision 29, article IV, of the constitution, which forbids the enactment of "local or special laws . . . affecting the fees or salary of any officer." On the other hand, it is contended that the act primarily referred to the system of townships in actual operation at the time of its passage, and thus in fact provided for all the constables of the county. But, according to this contention, the act is not confined in its application to the old system, but applies also to the new; and, without this proposition, the case of the respondent, being that of an officer of the new system, would fail. Hence, thus construed, the act still remains a local and special law, applying only to some of the townships—in this case five out of sixteen—and to certain of the constables of the county. And upon some new division of the county by the supervisors, under the power vested in them by section 25, subdivision 2, of the act, the case might become even worse.

But I do not think the act admits of either construction. Section 183, in terms, refers to the whole of the county, and subdivision 14 must, therefore, be so construed. It follows that, in the latter provision, the reference is to the old township organization, by which the county was divided into ten townships; and from the nature of the case this reference must be taken to be exclusive. For the townships referred to are the mere creatures of the ordinance dividing the county into townships, and exists only as parts of the township organization thus established. Hence the names of the townships, in either system, must be regarded as correlative terms, referring to their signification to the system, and different from the same names in other systems. Hence in this case the townships of the new system, though bearing, some of them, the same names, and in some cases coincident in territorial extent, are other and different entities from those

of the old. Thus, e. g., township No. 2 of the old system, which is subdivided into townships Nos. 2 and 12 of the new system, cannot be regarded as identical with either; nor can township No. 7 of the one system be regarded as the same as township No. 7 of the other, though both bear the same name and cover the same territory. And the same observations will be true of any new township organization of the county by the board of supervisors under section 25, subdivision 2, of the act.

To confirm this view, we have but to attempt to apply the other. If the provision of the act is to be regarded as applying to the new system, what principle of identification are we to adopt by which to determine the townships of the new system that are to be taken as the same as those of the old? Obviously, we must take for this purpose either identity of name or of territory; that is, we must either assume that the legislature intended the provisions of subdivision 14, section 183, of the act to apply to townships Nos. 1 to 10, inclusive, of the new system—though differing in territory—or that it intended them to apply only to townships Nos. 1, 5, 7, 8, and 9, which cover the same territory as the townships similarly numbered in the old system. But it cannot be supposed that the legislature intended either of these things. For, omitting other considerations, the name and territorial extent of a township are—with reference to the county—purely accidental circumstances; and under some other system established by the supervisors there might be no identity of either. In such case what principle of identification could be applied?

We conclude, therefore, that the act must be construed as referring exclusively to the old system of townships, and as having no application to any other. Hence, upon the termination of the old system there ceased to be any subject to which the provision could apply. So, also, it must be held that the act, being confined in its application to the system of townships and township officers existing at the time of its passage, and making no provision for the townships and officers of the new system, or those of new systems that may hereafter be established, still remains, under this construction, open to the objection of being local and special. Nor is there any construction conceivable upon which it could be otherwise regarded.

Under any view of the case, therefore—whether we regard the provision of the act in question as unconstitutional, or as having no application to the new township organization—the plaintiff's case must fail.

We advise that the judgment appealed from be reversed and the cause remanded, with instructions to dismiss the proceeding.

Haynes, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is reversed and the cause remanded, with instructions to dismiss the proceeding.

Temple, J., McFarland, J., Henshaw, J.

[S. F. No. 1886. Department Two.—September 4, 1900.]

GEORGE S. WRIGHT, Appellant, v. KATE C. PERRY
BYRNE and FLORENCE BLYTHE HINCKLEY, Re-
spondents.

GUARDIAN AND WARD—NOTE FOR MONEY BORROWED BY PREVIOUS GUARDIAN—NONAPPROVAL OF COURT.—The note of a new guardian given for money borrowed for the support and care of the ward by a previous guardian, which is not approved by the court having jurisdiction of the estate, cannot bind the ward.

ID.—NONLIABILITY OF GUARDIAN—WANT OF CONSIDERATION.—The new guardian, never having received any consideration for the note, cannot be held personally liable thereupon.

ID.—DEBT FOR SUPPORT AND CARE OF WARD—PRESUMPTION AGAINST PAYMENT BY NOTE—STATUTE OF LIMITATIONS.—The note cannot be presumed to be in payment of the original debt of the estate of the ward for money borrowed for the ward's necessary support and care. But where it appears that such original indebtedness is barred by the statute of limitations, and that statute is pleaded by the ward, the debt can neither sustain an action against the ward upon the unratified note in suit nor any possible recovery against the ward.

ID.—NONRATIFICATION OF NOTE BY WARD.—The ward, not having received any benefit from the note sued upon, and never having been in any manner originally liable thereupon, cannot be subject to an action based thereupon, in the absence of proof that it was directly

ratified and agreed to be paid by the ward after attaining majority. In such case it is not necessary for the ward to disavow liability upon the note after attaining majority.

ID.—ADMISSION OF PLEADING—RECEPTION OF BENEFIT BY WARD.—An admission in the answer by failure of the ward to deny the reception of the benefit of the money borrowed for the ward's support during minority, whatever effect it might have in an action for necessities supplied to the ward, cannot amount to a ratification of the subsequent note sued upon.

ID.—ORAL AGREEMENT OF DEFENDANTS.—An oral agreement of the defendants that if recovery should be had against both defendants on the note sued upon the one who signed it as guardian would pay it does not show a ratification of the note by the ward.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. Edward A. Belcher, Judge.

The facts are stated in the opinion.

M. M. Estee, for Appellant.

Wilson & Wilson, and Hepburn Wilkins, for Kate C. Perry Byrne, Respondent.

W. H. H. Hart, and A. R. Cotton, for Florence Blythe Hinckley, Respondent.

GRAY, C.—Plaintiff appeals from a judgment against him for costs, and from an order denying him a new trial.

The action was commenced April 20, 1896, and is to recover the amount of a promissory note dated November 19, 1891, for four thousand seven hundred and fifty dollars and interest. This note is signed: "Kate C. Perry, guardian for the person and estate of Florence Blythe, a minor." In addition to the usual allegations in a suit on a promissory note the amended complaint contains the following:

"That the said Kate C. Perry Byrne (then Kate C. Perry), as guardian of the person and estate of the defendant Florence Blythe Hinckley (then Florence Blythe, a minor), received and expended the moneys for which said promissory note was made, for the sole use and benefit of the said defendant Florence Blythe Hinckley (then Florence Blythe, a

minor)—that is to say, for the necessities of life, to wit, house rent, food and raiment; and that the said Florence Blythe Hinckley, upon attaining her majority, duly ratified the act of her said guardian in incurring said indebtedness and making said promissory note in the following manner: 1. By knowingly receiving the benefits derived from the expenditure of the moneys for which said promissory note was given, and not dissenting from or disaffirming the said act of her said guardian upon arriving at her majority; 2. By orally agreeing to repay the amount of money represented by said note and the said note.”

The complaint also alleges that the note was made and executed for a valuable consideration. The defendants answered separately, said Byrne in effect denying that the note was made for a valuable or any consideration, denying that she received or expended any money for which said note was given, and alleging that she received no consideration for said note whatever. Said Hinckley, in substance, denies that her codefendant had any authority to make the note as guardian, denies that she (Hinckley) received any consideration for said note, and avers that there was never any consideration for any alleged agreement by her to repay the money represented by said note or to pay said note or any part thereof. Defendant Hinckley also denies all the allegations of the complaint as to ratification, receiving the benefits of the note, and agreeing to pay the amount represented thereby after she came of age. On all these issues the findings are in accord with the denials and affirmative allegations of the answers.

The only consideration for the note sued on disclosed by the evidence is an indebtedness in the sum of two thousand five hundred dollars and interest for money loaned to Perry, the original guardian of the defendant Florence Blythe Hinckley, on or before the fourth day of December, 1886, and certain rent due on the Fairfax place which, according to the evidence, must have accrued prior to 1887, for, as we understand it, the Perry family left the Fairfax place some time in 1886. The two thousand five hundred dollars indebtedness is evidenced by an exhibit introduced in evidence and reading as follows:

“This is to certify that as guardian of Florence Blythe, a

minor, I have received of M. S. Jeffers and G. S. Wright the sum of twenty-five hundred (2,500) dollars on account of said minor, and for and toward her support and care, which sum I agree, as her guardian, to pay out of the first money belonging to her estate coming into my hands as such guardian, or into the hands of my successor, and I hereby charge her estate with said sum, and I, as such guardian, also promise to pay interest on said sum from this date at the rate of ten per cent per annum.

"Witness my hand this 4th day of September, A. D. 1886.

"JAMES C. PERRY,

"Guardian of the Person and Estate of Florence Blythe, a Minor.

"Witness: Wm. H. H. Hart."

There is no evidence that the note in suit was to operate as payment or extinguishment of the previous indebtedness, but it would seem from the evidence that the original indebtedness is still in existence and capable of being enforced were it not for the statute of limitations. (*Brown v. Olmsted*, 50 Cal. 162.) Said indebtedness was not owing from defendant Byrne, and is not a good consideration in law for her promissory note. Byrne received nothing, and plaintiff parted with nothing to induce Byrne to execute the note. So far, then, as defendant Byrne is concerned, certainly the finding that she did not make the note for a valuable or any consideration was supported by the evidence, and is decisive of the case as to her. (*Comstock v. Breed*, 12 Cal. 286; *Leverone v. Hildreth*, 80 Cal. 139; *Chaffee v. Browne*, 109 Cal. 211.)

As to plaintiff's right of action against defendant Hinckley, it is clear that recovery must be had, if at all, on the theory that she is liable on the note in suit. This is so for two reasons: 1. Because the complaint is drawn that way; and 2. Because a right of action against her on any other theory consistent with the evidence would be barred by the statute of limitations pleaded in her answer. She cannot be held liable on the theory that the note was executed by her guardian, as guardian, for no authority from the probate court is shown for such execution. (*Morse v. Hinckley*, 124 Cal. 154, and cases therein cited.)

There is no evidence to show that defendant Hinckley, after reaching her majority, received anything that plaintiff parted with as a consideration of the note, or derived any benefit therefrom. The case is equally barren of evidence that after she came of age she orally or otherwise agreed to repay the amount of money represented by the note. Indeed, there is nothing in the record to show that she in any way after she was eighteen years of age ratified the act of her guardian in giving the note. Her admission in the answer, by failing to deny the fact, that she received during her minority the benefit of the moneys for which the note was given, does not amount to a ratification of the note, however valuable such an admission might be in a suit brought within the time allowed by law to recover for necessities furnished. Nor is there any reference to the note or any other expression in the contract between the defendants dated March 12, 1892, that could be construed into any ratification of the note or that can in any way make her liable thereon. Never having been bound by the note nor liable thereon, it was not necessary for her to disavow all liability on it on coming of age to avoid being held for its payment. Neither is there anything to show ratification of the note in the oral evidence of agreement between the defendants that if judgment went against them defendant Byrne would pay the whole of it. Having in view the fact that the suit herein is based on a promissory note and an alleged ratification thereof, we deem it unnecessary to notice the other points made by appellant, many of which we cannot see the application of to the case in hand. The findings are supported by the evidence and support the judgment. There was no material error in the rulings of the court on objections to evidence.

We advise that the judgment and order be affirmed.

Chipman, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Temple, J., McFarland, J., Henshaw, J.

[Sac. No. 828. Department Two.—September 4, 1900.]

SAMUEL EDMONDS, Respondent, v. C. C. WEBB, Appellant.

LANDLORD AND TENANT—ACTION BY LESSEE—WRONGFUL ENTRY OF LESSOR—TERMS OF VERBAL LEASE—SUPPORT OF FINDING.—In an action by a lessee to recover damages for a wrongful entry by the lessor where it was not disputed that the parties agreed to a verbal lease for one year after the expiration of a written lease, and the defendant testified that the terms of the verbal lease were in accordance with the terms of the written lease in evidence, a finding in accordance with the testimony of the plaintiff, and with terms of the verbal lease set forth in the complaint and not denied in the answer, showing a substantial accordance with the terms of the written lease, with a variation not material to the controversy, is sufficiently supported.

ID.—SUFFICIENCY OF EVIDENCE—SUPPORT OF ORDER DENYING NEW TRIAL. Where the plaintiff recovered judgment for damages, and all the challenged findings are sufficiently supported by the testimony for the plaintiff, and findings as to the entry of the defendant and his ouster of plaintiff before the expiration of the undisputed verbal lease and as to the amount of the damages are not challenged, an order denying a new trial to the defendant, moved for on the ground of the insufficiency of the evidence, is properly supported, and must be affirmed upon appeal.

APPEAL from an order of the Superior Court of Siskiyou County denying a new trial. J. S. Beard, Judge.

The facts are stated in the opinion.

Warren & Taylor, for Appellant.

L. F. Coburn, James F. Lodge, and O'Neill & Butler, for Respondent.

COOPER, C.—This action was brought by plaintiff for the purpose of recovering two thousand four hundred dollars damages, alleged to have been caused by the defendant's wrongful entry upon the premises described in the complaint and converting the crops thereon to his own use. The premises had been leased by defendant to plaintiff, and the entry complained of was during the continuance of the lease. The case was tried before the court without a jury, findings filed,

and judgment ordered for plaintiff for the sum of nine hundred and seventy-three dollars and fifty-two cents. There is no appeal from the judgment. The defendant made a motion for a new trial, which was denied, and this appeal is from the order denying defendant's said motion.

The only contention of defendant's counsel is the insufficiency of the evidence to sustain certain of the findings. It is contended with much apparent earnestness that finding No. 4 is not sustained by the evidence. The finding is as to some of the covenants of a verbal lease entered into between plaintiff and defendant, and, among other matters, it is found: "That plaintiff agreed to plough, harrow, and otherwise prepare said land for crops aforesaid; . . . to cultivate the same in a husbandlike manner, according to the usual court of husbandry practiced in the neighborhood; to care for and protect said crop until maturity; . . . to deliver to defendant one-fourth of the crops produced on said land; . . . also one-fourth of the straw and stubble; . . . to all of which defendant also agreed."

The court in findings 1, 2, and 3, which are not challenged, found that plaintiff and defendant entered into a written lease in June, 1894, for one year. That the said written lease contained a covenant that it might be extended at its expiration for two years longer, that after its expiration the plaintiff continued to occupy the premises subject to its terms until about the first day of March, 1897, when the plaintiff and defendant entered into a verbal lease for the period of one year from the first day of September, 1897, and then in finding 4 the court found the terms of the lease. The written lease was introduced in evidence, and it contains substantially the covenants found by the court in finding 4. The plaintiff in his testimony, in speaking of the verbal lease, said: "The terms of the verbal agreement was the same as in the lease. No change only in the division of the pasture." The defendant testified: "At the expiration of that lease [speaking of the written lease] he wanted to continue it for two years, and it was agreed that he should under the same terms and conditions of the lease. After that two years expired he wanted to continue for another year, and I continued it for another year under the same terms and conditions."

The above testimony supports the finding. Not only does the testimony support the finding, but the complaint, which was verified, sets forth the terms of the verbal lease in substance as found by the court, and the terms as alleged are not denied in the answer. Again as we view the case the challenged finding is not material. It only details some of the covenants of the verbal lease, none of which are material here. That there was a verbal lease for one year is not disputed. That the defendant entered and ousted the plaintiff before the expiration thereof is not controverted. The material question, then, was as to the amount of damages sustained by the plaintiff. The court found as to the amount of damages, and the finding is not challenged. It is further contended that the following portion of finding numbered 5 is not sustained by the evidence: "And that plaintiff cared for and protected the same except when prevented by the acts of defendant." The portion of the finding challenged has reference to the care of the crops by plaintiff. The finding is supported by plaintiff's testimony. He says, in speaking of the crop: "I cared for it until it was harvested," and after stating that he was prepared to harvest the crop plaintiff further says: "Webb stopped me from harvesting it; sent a constable out from Montague to stop me. Webb went to the field first to harvest it. He was in there four days before I knew it; . . . he stopped me by warrant of arrest, and he went on and harvested the crop."

Finding numbered 8 is sustained by the evidence. This disposes of all the challenged findings, and no other matters are discussed.

The order should be affirmed.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed. McFarland, J., Temple, J., Henshaw, J.

[Sec. No. 491. In Bank.—September 4, 1900.]

RECLAMATION DISTRICT No. 108, Respondent, v. W.
H. WEST, Appellant.

RECLAMATION DISTRICT—ASSESSMENT NOT PROPORTIONED TO BENEFITS.

An assessment by a reclamation district must be made in proportion to the benefits which will result to the land assessed from the works upon which the money raised thereby is to be expended. An assessment of all the reclaimable lands of the district equally for the construction and maintenance of works, which cannot result in the reclamation of more than one-half of the lands of the district, is unjust, and not permissible under the reclamation law.

1D.—“BENEFITS” TO BE CONSIDERED.—The “benefits” which are to be taken into account by the commissioners in apportioning the charge or assessment are those benefits only which spring from the system of works which such assessments is levied to construct or maintain.

1D.—APPORTIONMENT OF BENEFITS FROM LEVEE—PROTECTION OF PART OF DISTRICT—PROSPECTIVE WORKS ELSEWHERE.—In apportioning the benefits to result from the construction and maintenance of a levee along a river, which has effected the reclamation of part only of the lands of the district, prospective benefits to be derived from another prospective system of works necessary to be constructed elsewhere in the future to protect the remainder of the reclaimable lands from overflow of waters from the hills cannot be considered, notwithstanding the levee system is beneficial, when taken in connection with such prospective system of works, to reclaim such lands. [McFarland, J., dissenting.]

APPEAL from a judgment of the Superior Court of Colusa County and from an order denying a new trial. H. M. Albery, Judge.

The facts are stated in the opinion.

E. A. Bridgford, for Appellant.

Adams & Adams, and E. T. Crane, for Respondent.

GRAY, C.—This action was brought to compel the defendant to pay assessment No. 16, levied on his land in 1896, for reclamation purposes. Plaintiff had judgment declaring the amount of the assessment to be a lien on said land and direct-

ing that the same be sold to satisfy said lien and costs. From this judgment and from an order denying him a new trial the defendant appeals.

The reclamation district, plaintiff, was formed in 1870, and embraces some seventy thousand acres of land lying to the west of the Sacramento river in Yolo and Colusa counties, and extending from Knight's Landing up said river about eighteen miles in length, and of an average width of about six miles. The lands of the district lie in the form of a basin, and about all of them are subject to overflow, in the season of high water, from the Sacramento river on the east. The lower half of the district is generally subject to inundation during the cropping season from streams having their sources in the mountains to the west and northwest. The reclamation works of the plaintiff, as originally planned and constructed, consist of a levee on or near the eastern boundary of the district, and bulkheads in the sloughs where they connect with the Sacramento river. Said works along the river have the effect to protect the lands of the district from the waters of that stream, but there is no protection from the waters on the other side, and no plans have been adopted by the district to reclaim its lands from such waters. Sixteen assessments have been levied during the history of the district—all of them for the construction and maintenance of the existing system of works. The land of defendant consists of four hundred and seventy-three acres lying in the basin below the thirty-foot contour line, and is a part of the thirty-five thousand acres subject to overflow from the streams mentioned as having their sources in the mountains to the west and northwest. It is of first-class quality, and would be exceedingly productive if the water were kept off; but owing to the fact that it has been inundated during the cropping season of almost every year since the organization of the district, it has produced little or nothing. The findings show, and it seems to be conceded, that the present system of reclamation works is inadequate to reclaim the lands of defendant or any other lands lying below the thirty-foot contour line. Said system is adequate, however, to reclaim all those lands that need reclaiming above said line. The assessment here in controversy was levied for the purpose of defraying the

expense of repairing and maintaining said works along the Sacramento river, and the total amount of said assessment was ninety thousand dollars, of which six hundred and thirty-one dollars and fifty-six cents was assessed against defendant's land. The evidence shows that four thousand five hundred and ninety-seven acres of land of the district were not assessed at all, the reason assigned therefor by the commissioners appointed to assess the lands being that a portion of it was so high that it needed no reclamation, and the rest was so alkaline in character as to be nonproductive and worthless under any and all circumstances. All the lands of the district other than said four thousand five hundred and ninety-seven acres were assessed at about one dollar and thirty-three and one-half cents per acre, varying only from one-half cent to one cent per acre, the lands below the thirty-foot contour line all being assessed at the maximum rate. The foregoing are the undisputed facts of the case.

In this action the defendant resists the enforcement of the assessment levied against his land on the ground, among others that said assessment on the various tracts of land in the district was not fixed in proportion to the benefits to be derived from the works upon which the moneys arising from said assessment were to be used; and particularly that his own land is assessed proportionately at a sum much greater than any benefits they have derived or can derive from the work done and to be done. Section 3456 of the Political Code provides that three commissioners shall be appointed, and that they "must view and assess upon the lands situated within the district a charge proportionate to the whole expense and to the benefits which will result from such works, and estimate it in gold and silver coin of the United States."

It is obviously unjust to assess all the lands of the district equally for the construction and maintenance of works which it is demonstrated can result in the reclamation of no more than half of said lands, and it was not intended by the framers of the reclamation law that any such thing should be done. (*Lower Kings River etc. Dist. v. Phillips*, 108 Cal. 306; *Reclamation Dist. etc. v. Sels*, 117 Cal. 164.) The district now contends that the present works along the river will, in connection with other works to be constructed in the future for the protection of the district from the west side waters, re-

sult in great benefit to the lands of defendant, and it seems to have been upon this theory that the commission made the assessment so nearly equal on all the lands assessed. Prospective benefits from prospective works are like prospective damages, difficult to estimate. But it is not difficult to see that such benefits are not equal in present value to actual benefits, already in sight, derived, and to be derived, from works already constructed. The "benefits" which are to be taken into account by the commissioners in apportioning the charge or assessment are those benefits only which spring from the system of works which such assessment is levied to construct or maintain.

It seems that the commissioners proceeded upon a wrong theory in apportioning the assessment. The benefits to defendant's land, from the present system of works, cannot be equal to benefits to lands which such works operate to reclaim, and which are shown to be of fairly good quality when so reclaimed. We therefore say that the allegation of the complaint to the effect that the lands of the district were assessed proportionate to the benefits which would and will result from the work of reclamation, and the finding of the truth of such allegation, is not supported by the evidence.

As the foregoing reasons are decisive of the case, it is unnecessary to consider the other points presented by counsel.

We advise that the judgment and order be reversed.

Cooper, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed.

Harrison, J., Henshaw, J.,
Temple, J., Van Dyke, J.,
Beatty, C. J.

McFARLAND, J., dissenting.—I dissent. The main contention of appellant is that his land has been assessed while it has received no benefits. This contention is based upon the following general facts: District No. 108 is one of the largest reclamation districts in the state, and includes about seventy thousand acres of land. It is bounded on the east by the Sac-

ramento river, and on the west by the slope of the plains up toward a range of hills which skirt that side of the Sacramento valley. It runs north and south from Knight's Landing, in Yolo county, on the south to the Sycamore slough in Colusa county. The district was organized more than twenty-five years before the commencement of this action. The main and most pressing source of overflow was, undoubtedly, the Sacramento river; and the main work to be done was the leveeing of the west bank of the river and the filling up along the bank of certain sloughs which flowed out from it. All the actual work which had been done before the commencement of this suit was on and along the said west bank of the river, and in establishing pumping plants. Great difficulty has been experienced in maintaining this levee so as to prevent any flow of water from the river into the district. Despite all efforts to prevent it, the river for many years frequently broke through the levee at places and inundated the district. It was only a year or two before the commencement of this suit that the levee was perfected so as to prevent any water flowing out from the river. On the western side of the district there are creeks and depressions which are usually dry, but which in the rainy season frequently carried considerable water; but before the river levee had been made perfectly secure it was supposed that the water which flooded the district came entirely from the river, and that the water which came from the western hills was so absorbed by the soil which had been dried out during the long summers that it would not materially affect any of the lands in the district. But after the water of the river had been entirely prevented from flowing out it was then discovered that the water from the western hills did actually flow upon the land of respondent and others, so as to make it unfit for cultivation notwithstanding the water from the river had been excluded. It is quite clear from the evidence that injury from the western waters was not known or anticipated until after the flow from the river had been completely stopped. After that the commissioners commenced to have surveys made for the purpose of erecting works to protect against the hill waters; but at the time the assessment here in question was levied the appellant's land was not protected from the said last-mentioned waters. And

appellant contends that upon this state of facts his lands had not been benefited by the work therefore done by the district, and that therefore the assessment is invalid. I do not think, however, that this contention can be maintained. Of course, in a district like the one here in question, and indeed in any district, all the work necessary to a complete reclamation cannot be done at once; and, if no assessment could be levied and enforced until the reclamation was complete, no district could be maintained or made to serve the purposes intended. The law contemplates a gradual progression of the work, looking to final complete protection and prospective benefits to be enjoyed after the reclamation shall have been perfected, and, with that end in view, provides for additional assessments. Moreover, as there is, at the start, more or less uncertainty as to what will be necessary to accomplish the complete reclamation, it is provided, not only that the original plans may be modified, but that, when necessary, new and additional plans may be adopted. By section 3456 of the Political Code power is given to make assessments proportionate to the whole expense "and to the benefits which will result from such works"; and by section 3454 the board is given power in its discretion, to modify or change such original plan or plans, or to adopt new, supplemental, or additional plan or plans, when, in its judgment the same shall have become necessary. In the case at bar the assessment in question was for work done as hereinbefore stated; and, in view of the provisions of the law above referred to, appellant is not in a position to deny that benefits to his land "will result from such works." We are not called upon to say what consequences would follow if no further works were contemplated, or if no such works should be commenced or prosecuted to completion within a reasonable time; such a condition of affairs does not appear here. And as appellant frequently asked witnesses if his lands would be benefited if the works should stop just where they now are, it was not error to allow respondent to show the facts, as above stated, about the waters on the west line of the district, the intention to construct works to protect against such waters, and the initiatory steps taken for that purpose.

The assessment is not invalid because certain lands in the district were not assessed. The commissioners found that

these were alkalai lands and of no value, and that the reclamation works would be of no benefit to them; and the evidence supports this conclusion. This matter was definitely settled against appellant's contention in *Reclamation Dist. No. 3 v. Goldman*, 65 Cal. 635, and *Lower Kings River etc. Dist. v. Phillips*, 108 Cal. 306.

I do not think that there are any other grounds for reversing the judgment, and think that it should be affirmed.

Rehearing denied.

[S. F. No. 1912. In Bank.—September 4, 1900.]

ALMA A. MURRAY, Petitioner, v. SUPERIOR COURT
OF LOS ANGELES COUNTY, Respondent.

INSOLVENT CORPORATION—APPOINTMENT OF RECEIVER—JURISDICTION OF EQUITY—CONSTRUCTION OF CODE.—A court of equity has no inherent power to appoint a receiver of an insolvent corporation merely because of its insolvency, or to wind up its affairs, in the absence of a statutory provision. Section 565 of the Code of Civil Procedure provides only for the appointment of a receiver upon the dissolution of a corporation; and subdivision 5 of section 564 of the same code does not contemplate the appointment of a receiver of an insolvent corporation in an action brought merely for that purpose, but only as ancillary to an action instituted against the insolvent corporation by some one authorized by law to commence it.

ID.—RECEIVER OF LIFE INSURANCE COMPANY—ACTION BY MEMBER—INSUFFICIENT SHOWING—WANT OF JURISDICTION.—The superior court has no jurisdiction to appoint a receiver of a life insurance company organized on the assessment plan under the act of 1891 (Stats. 1891, p. 126), and to take its assets from the control of its directors, at suit of a member thereof, on the alleged ground that its total liabilities exceed its assets, that merely one-half of its assets are due on policies to deceased members, that the directors have transferred outstanding policies to another company and have ceased to issue policies, and that salaries and expenses are wasting the assets, where there is no showing of fraud or mismanagement, or that the corporation has been dissolved, or has been adjudged insolvent, or has forfeited its right to do business under the act of 1891.

ID.—CONSTRUCTION OF ACT OF 1891—RESTRAINT OF INSURANCE CORPORATION FROM DOING BUSINESS—REPORT OF INSURANCE COMMISSIONER

—ACTION BY ATTORNEY GENERAL.—Though it was not the intent of the legislature that corporations organized under the act of 1891 should be exempt from all laws, rules, or decisions under the general laws of the state, yet that act provides a complete remedy by which the corporation may be restrained from doing business, through the machinery provided in section 10 thereof, by proceedings instituted by the attorney general, upon an adverse report of the insurance commissioner after examination into the affairs of the corporation. There is no other method provided in the act by which the authority of the corporation to do business can be revoked.

ID.—VOID APPOINTMENT OF RECEIVER—PROHIBITION—APPLICATION BY JUDGMENT CREDITOR OF CORPORATION.—A writ of prohibition will issue to restrain the superior court from maintaining possession of the assets of an insurance corporation by a receiver whose appointment is void, as being in excess of the jurisdiction of the court, upon application of a creditor of the corporation who has obtained judgment against it, and who has levied an execution upon moneys, credits, and personal property held by the receiver.

PROHIBITION from the Supreme Court to the Superior Court of Los Angeles County. M. T. Allen, Judge.

The facts are stated in the opinion of the court.

Richards & Carrier, M. E. C. Munday, and Del Valle & Munday, for Petitioner.

D. P. Hatch, Hunsaker & Freeman, and Hunsaker & Britt, for Respondent.

THE COURT.—This is an application for a writ of prohibition against the superior court of Los Angeles county. The petitioner, having obtained a judgment against "The Bankers' Alliance of California," a corporation, had an execution issued thereon, and levied or attempted to levy the writ upon certain moneys, credits, and personal property under the control of one Washburn, who claims to be holding the same as receiver in obedience to the order of the superior court of Los Angeles county, in an action brought by one Jeffries against the said corporation and its directors. The question to be determined here is as to whether the said superior court in said last-named action exceeded its jurisdiction in the appointment of said Washburn as receiver, and ordering him to take charge of the said moneys and properties. The question

will have to be determined by an examination of the complaint in said action. The complaint alleges that the defendant, "The Bankers' Alliance of California," is a corporation organized under the laws of the state of California for the purpose of the mutual protection of the members thereof and the payment of stipulated sums of money to the members, and not for profit, and it had no capital stock. That the plaintiff, in pursuance of the by-laws and regulations of said corporation, applied for a policy of insurance upon his life, and thereby became and is a member thereof. That the total assets of said corporation is the sum of about ninety-six thousand dollars and no more, and the total liabilities about one hundred and twenty thousand dollars, of which latter sum about forty-six thousand seven hundred dollars is due on policies which were issued on the lives of members who have died. That the said corporation through its board of trustees has entered into an agreement with the "Chicago Guaranty Fund Life Society of Chicago," whereby it has transferred to said society all its interest in all policies outstanding and premiums to become due thereon. That it has ceased to issue policies and to carry on the business and purposes for which it was organized. That the trustees of said corporation are receiving a salary of one hundred dollars each per month, and that it is paying one hundred and fifty dollars per month for offices, and has other large expenses. That unless the court interferes and takes charge of the assets of said corporation they will be wasted and consumed in expenses, and there will be nothing left with which to pay death claims due policy holders. The prayer is that the directors or trustees be enjoined from paying out the funds of the corporation, from interfering with or transacting the business thereof, and that a receiver be appointed to take charge of all moneys and properties and collect all dues, and that all creditors present their claims to the receiver to be by him adjusted and paid. The court made an order enjoining the directors from carrying on the business of the corporation and appointing said Washburn receiver, directing him as such receiver to take charge of all the moneys, property, and assets of the corporation. We think the court did not have jurisdiction, by virtue

of the facts stated in the complaint, to appoint a receiver. The corporation had not been dissolved, and no attempt is made to have it dissolved. It was not sought to have it declared insolvent, or to have its assets distributed among its members. The object and purpose of the action was to take the assets and business from the directors and turn them over to a stranger. It is not sought to remove the directors or either of them, nor is there any allegation of fraud or misconduct as to them or either of them. The court does not possess the power upon the facts stated in said complaint to take the property of the corporation, in this case, where the corporation has not been dissolved nor adjudged insolvent, and in the absence of any charge of fraud or mismanagement of the persons who have been selected by the corporation to manage its business, turn it over into the hands of a third party. The property of a corporation belongs to its stockholders or members, and the corporation, as an artificial person, has the same rights as to its property and the control thereof that an individual would have unless controlled by some express statutory declaration. We find no statute authorizing the appointment of a receiver upon the ground that the corporation is not prosperous, or because its liabilities are greater than its assets. The Code of Civil Procedure contains the following section:

"Sec. 565. Upon the dissolution of any corporation, the superior court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and pay the outstanding debts thereof, and to divide the moneys and other property shall remain over among the stockholders or members."

It will be observed that the above section provides for the appointment of a receiver only "upon dissolution of the corporation." The corporation not having been dissolved it is evident that the section does not authorize the appointment of the receiver. It is said by Beach in his work on Receivers, section 86: "The courts have not the power to appoint re-

ceivers to wind up the affairs of a corporation in the absence of statutory provisions"; and again the same author says, section 425: "Aside from statutory provision insolvency alone is not a sufficient cause for the appointment of a receiver; and mere insolvency will not warrant the granting of such a drastic remedy. A court of equity has not inherent power to appoint a receiver of a corporation because of mere insolvency. . . . To question the proposition asserted would be to deny the right of stockholders and officers of a corporation to manage and control the company's affairs under ordinary circumstances. Courts of equity have no greater control over the affairs of a private corporation, when it becomes insolvent, than they have over the affairs of an individual."

It is provided in the Code of Civil Procedure, section 564, subdivision 5, that a receiver may be appointed "in the cases when a corporation has been dissolved, or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights."

This court passed upon the particular subdivision of said section in *La Societe Francaise D'Epargnes etc. v. District Court*, 53 Cal. 495, 553, and in the opinion said: "The particular subdivision, however, which is supposed to confer the power in question and to authorize the district court to appoint a receiver of the property of this corporation, is the fifth—being the only portion of the statute in which corporations are named: 'A receiver may be appointed . . . in the cases when a corporation . . . is insolvent.'"

"There is, of course, no such thing as an action brought distinctively for the mere appointment of a receiver; such an appointment, when made, is ancillary to or in aid of the action brought. Its purpose is to preserve the property pending the litigation, so that the relief awarded by the judgment, if any, may be effective. The authority conferred upon the court to make the appointment necessarily presupposes that an action is pending before it, instituted by some one authorized by law to commence it. But there is no statute in this state, none to which we have been pointed, which undertakes to confer upon a private person, either as stockholder or creditor, the right to maintain an action to dissolve a corporation

upon the ground that it is insolvent, or to obtain relief by seizing its property out of the hands of its constituted management, and placing it in the hands of a receiver." This construction of the subdivision was followed and approved by this court in Bank in the late case of *Fischer v. Superior Court*, 110 Cal. 141. (See *Neall v. Hill*, 16 Cal. 150¹; *Fischer v. Superior Court*, *supra*; *Havemeyer v. Superior Court*, 84 Cal. 364²; *People's Home Sav. Bank v. Superior Court*, 103 Cal. 27; *Harrison v. Hebbard*, 101 Cal. 152.)

It is claimed that as the corporation was organized and doing business under the act of December 19, 1891 (Stats. 1891, p. 126), entitled, "An act relating to health, accident, and annuity or endowment insurance on the assessment plan and the conduct of the business of such insurance," that it is not governed by the general laws or any other statute than the act under which it was incorporated. That section 2 of the act provides that such corporation "shall be subject only to the provisions of this act." We do not think it was the intent of the legislature that corporations created under the act should be exempt from all laws, rules, or decisions under the general laws of the state. The clause quoted relates to the contracts of insurance, the deposit with the state treasurer, the reserve fund, and the investment thereof, and other regulations as to the management and business of such corporation. But if we were to look to the act alone it provides a complete remedy by which the corporation may be restrained from doing business. Section 10 of the act is as follows: "If the insurance commissioner, after examination of the affairs of a corporation, shall find that such corporation is not doing its business in conformity to this act, or that it is doing a fraudulent or unlawful business, or that it is not carrying out its terms of contract, or that it cannot within three months from the date of notice of default pay its obligations, he shall cite the president, secretary, manager, or general agent of said corporation, or all of them, to appear before him (stating the time and place) to show cause why the authority of such corporation to do business shall not be revoked; and, if they cannot show cause, then he shall report the facts to the attor-

¹ 76 Am. Dec. 508.

² 18 Am. St. Rep. 192.

ney general of this state, who shall commence proceedings in the proper court to restrain said corporation from doing any further business."

By the provisions of the section the corporation is given the right to be heard, before the insurance commissioner, after being notified.

If, in the opinion of the commissioner, no cause can be shown why the authority of the corporation to do business should not be revoked, he shall report the facts to the attorney general, whose duty it is to commence proceedings to restrain the corporation from doing business. It seems to us that if the corporation "is to be subject only to the provisions of the act" that it would have to be restrained from doing business by the machinery provided in said section 10. There is no other method provided in the act by which its authority can be revoked. In speaking of the act and of this section this court said in *San Francisco Sav. Union v. Long*, 123 Cal. 112. "The act contains no provision in regard to the insolvency of the corporation, but in section 10 a procedure is provided for revoking its authority to do business, when it is carrying on a fraudulent or unlawful business, is not carrying out 'its terms of contract,' or cannot within three months from the notice of default pay its obligations."

It is claimed that the corporation had become insolvent and ceased to do business at the time the receiver was appointed. Section 4 of the act, after providing for the payment of beneficiaries, reads: "Failure to make such payment, within thirty days after notice, at the home office, by mail, as provided by law, or final judgment, unless waiver is made by the beneficiary, shall constitute a forfeiture of the right to do business." It is not alleged that the corporation has, after thirty days' notice, failed to pay any final judgment. The statement in the complaint is: "That a large amount of money is due upon its policies issued upon the lives of its policy holders, and that the holders thereof are clamorous for the amounts due." The writ of prohibition will lie in this class of cases. (*Havemeyer v. Superior Court, supra; State etc. Co. v. San Francisco*, 101 Cal. 135.)

It is ordered that a peremptory writ of prohibition issue to the said superior court of the county of Los Angeles in accordance with the prayer of the petition and the views herein expressed.

Rehearing denied.

Beatty, C. J., dissented from the order denying a rehearing.

[L. A. No. 603. Department Two.—September 5, 1900.]

H. M. KUTCHIN et al., Appellants, v. JOHN ENGELBRET, Respondent.

STREET IMPROVEMENT—CONTRACT—AMOUNT OF WORK.—A contract for a street improvement calling for less work than that proposed in the resolution of intention of the common council is void.

ID.—SPECIAL PERMITS TO LOT OWNERS—RESOLUTION OF INTENTION—ASSESSMENT.—The common council has no power, intermediate the passage of a resolution of intention to order a particularly described street improvement and the passage of the resolution ordering the work, to grant special permits to individual lot owners to do such portions of the work as are adjacent to their premises; and if it does so, a contract subsequently entered into to do the work in front of the lots of owners to whom special permits had not been granted, and an assessment therefor levied on such lots alone, are void.

APPEAL from a judgment of the Superior Court of San Diego County. E. S. Torrance, Judge.

The facts are stated in the opinion of the court.

L. L. Boone, for Appellants.

Haines & Ward, for Respondent.

TEMPLE, J.—This is an action to remove the cloud of a street assessment lien from the title of plaintiffs to several lots in the city of San Diego.

June 16, 1896, the common council of San Diego passed a resolution of intention to order a described portion of First

street to be "sidewalked," excepting such portions of said First street and intersections between said points as have already been sidewalked with concrete or bituminous rock, laid to the official grade and accepted," and also to order the same described portion of the street, with the same exceptions, to be curbed.

There were forty-eight lots between the points indicated, in front of twenty-eight of which lots the work had been done prior to the resolution of intention. The work was ordered by resolution, passed December 21, 1896, in which the work to be done, and the property, were described in the same language which had been used in the resolution of intention, but intermediate the resolution of intention and the resolution ordering the work, special permits were given to owners for sidewalking and curbing, and under these the work was done on about one-half the lots, upon which the work had not been done at the time the resolution of intention was passed. So that the same words in the resolution ordering the work would include only about one-half the lots described in the resolution of intention.

The contract entered into did not include the lots in front of which special permits had been granted to owners to do the work, nor are such lots included in the assessment. All these facts are set forth in the complaint, with other matters, and it is charged that, by reason of manifest defects, the assessment is void.

The answer expressly admits that at the date of the resolution ordering the work First street had been sidewalked and curbed as alleged in the complaint in front of all the lots for which, it is alleged in the complaint, special permits had been granted, and that the contractor did no work in front of said lots, and none of them are included in the assessment, but denies for lack of sufficient knowledge or information to form a belief, that the work specified was done after the passage of the resolution of intention. Upon this issue the finding was for plaintiffs.

Appellants contend that the resolution ordering the work is void because it does not include all the work included in the resolution of intention. It does, however, as already stated, describe the work ordered in the precise words used in the

resolution of intention, and it is not, therefore, void on its face. As to the description, each resolution must be regarded as referring to conditions existing at its date, and it is familiar law that extrinsic facts may be proven to apply to descriptive language to the objects described.

Respondent, however, says that if the board had the right to permit lot owners, after the resolution of intention, to do the work in front of their respective lots, this fact will not render the assessment void. If the board had no such power, then the resolution ordering the work must be construed as including them. This would not be of ultimate service to respondent if his position were sustained; for then the contract and the assessment would be void, because they would follow neither the resolution ordering the work or the award, or, if they follow the award of the contract, it—that is, the award—is unauthorized.

Evidently the work which the council may order done is that which they proposed in the resolution of intention; and it is provided, "before passing any resolution for the construction of said improvements, plans, and specifications and careful estimates of the costs and expenses thereof shall be furnished," etc. Then notice inviting sealed proposals or bids "for doing the work ordered" must be given. When such bid is made and accepted the contract is virtually made. (*Argenti v. San Francisco*, 16 Cal. 255; *Dougherty v. Hitchcock*, 35 Cal. 512; *Chambers v. Satterlee*, 40 Cal. 526.) In preparing and executing the formal contract the superintendent of streets acts ministerially. The bid, then, is to do the work ordered, and the contract is for such work. The superintendent of streets can only enter into the formal contract already agreed upon. It seems, therefore, that all subsequent proceedings are, in a sense, dependent upon the resolution of intention. If work is ordered in excess of the resolution of intention, the latter order may be void only as to the excess, if severable. (*Gafney v. San Francisco*, 72 Cal. 146.) But if the contract is for less work than was proposed in the resolution of intention it is void. (*Dougherty v. Hitchcock*, *supra*; *Stockton v. Whitmore*, 50 Cal. 554; *McBean v. Redick*, 96 Cal. 191; *Warren v. Chandos*, 115 Cal. 382.)

Counsel for respondent argues that these authorities have no application to the present case. In *Dougherty v. Hitchcock*, *supra*, *Stockton v. Whitmore*, *supra*, and *McBean v. Redick*, *supra*, all the work called for in the resolution of intention was not done or contracted for. It is said that property owners might be content if all the improvements were made, but might feel that doing part of the work proposed would be of no benefit. Each inhabitant has the right to the use of all the streets, and might well be content to contribute to improvements which would make a good street for ten blocks, when he would not be at all benefited if the improvement extends only through the block in which his property is situated. Here, it is said, the entire work proposed was done; the only complaint is that some of the work was done by the lot owners themselves, and not by a contractor under the provisions of the law. Still in this case the entire improvement will be made. This difference removes one of the arguments by which these decisions are supported, but there are other respects in which the property owner may be injured if the contract does not include the entire work proposed.

1. All frontage is bound for expenses, including engineer's estimates, advertising, etc. If a large improvement is ordered, these may amount to a considerable sum. The lot owner might be willing that the work should be done if a hundred lots were bound to contribute equally in this expense, but might in reason object if only his lot were bound. Those who do the work in front of their lots escape the assessment altogether. If the lot owner knew that his lot would be the only one assessed, although the entire improvement would be made, he would be very likely to remonstrate. And 2. It would probably increase the cost of the work to the lot owner if only a small part of the work was finally to be done by contract. There would probably be fewer bidders for a small job, and the cost might be much increased to each lot owner. And then, as to the work done under permits, it would take away the lot owner's right to appeal to the board and contend that inferior work has been accepted by the superintendent of streets. For these reasons I am of the opinion that the present case is within the rule established by those cases.

The contention that the statute authorizes permits to be given to lot owners to do the work after the resolution of intention has been passed, and before the resolution ordering the work, rests upon the construction of subdivision 10 of section 7 of the Vrooman act, as amended in 1889. (Stats. 1889, p. 164.) That subdivision first provides that lot owners may grade in front of their lots, first getting permission to do so, "but before said council has passed its resolution of intention." Provision is then made for a credit to such lot owners whenever thereafter that street is graded under contract made in pursuance of law. It will be seen that lot owners doing grading are not excepted from the assessments, but only get a credit for the work they have done. Then follows in the same subdivision the provision here to be construed, as follows: "Whenever any owner or owners of any lots and lands fronting on any street shall have heretofore done or shall hereafter do any work (except grading) on such streets in front of any block, at his or their own expense, and the city council shall subsequently order any work to be done of the same class in front of the same block, said work so done at the expense of such owner or owners shall be excepted from the order ordering work to be done, as provided in subdivision 11 of this section of this act; provided, that the work so done at the expense of such owner or owners shall be upon the official grade and in a condition satisfactory to the street superintendent at the time said order is passed."

This does not expressly declare that lot owners may do any of this work after the resolution of intention, nor is there a provision for any permit to lot owners to do the work. If the provision in regard to permits applies to this matter, it would seem that the qualification would also attach that it must be before the resolution of intention.

The general rule upon this subject is, admittedly, that the work to be done is that described in the resolution of intention. The apparent exceptions have been stated. Ordinarily, if only a part of the work is ordered to be done the resolution is void, because the work ordered was not the work which the council notified the lot owners the council intended to have done. (*Warren v. Chandos, supra.*)

This is also authority for the proposition that in such case the lot owner has not had an opportunity to be heard upon the proposal to do the work finally contracted for, and for which he is assessed. It is not to be presumed that any such consequence was intended, and, indeed, the provision is that work so done by the owner shall be excepted from the order ordering work to be done as provided in subdivision 11. In that subdivision it is provided that different kinds of work may be included in the resolution of intention in which any work already done may be excepted, and that the lots in front of which the work has already been done shall not be included in the assessment. The exceptions must be the same in the two resolutions and in the assessment.

Under these views it is not necessary to discuss the other points raised by appellant. The facts appear in the findings, or are conceded in the pleadings, which show the invalidity of the assessment.

The judgment is, therefore, reversed, and the cause remanded with directions to the trial court to enter judgment for the plaintiffs.

Henshaw, J., and McFarland, J., concurred.

[L. A. No. 678. Department Two.—September 5, 1900.]

W. F. SECHRIST et al., Appellants, v. RIALTO IRRIGATION DISTRICT et al., Respondents.

PLEADING—ORDER UPON DEMURRER—LIMITED RULING—REVIEW UPON APPEAL.—The court cannot limit its order upon demurrer by sustaining it in part and overruling it in part, so as to deprive the demurrants of the benefit of any of the grounds assigned; and upon appeal by the plaintiff from a judgment rendered upon demurrer to the complaint, which was sustained as to the general demurrer, and overruled in other respects, the ruling made will be considered as an entirety, and the judgment must be affirmed if the demurrer is well taken upon any of the grounds assigned, regardless of the reasons assigned by the court below for its order.

ACTION TO CANCEL BONDS OF IRRIGATION DISTRICT—STATUTE OF LIMITATIONS—DEMURRER TO COMPLAINT.—In an action to cancel the bonds of an irrigation district, where any part of the cause of action alleged is not barred by the statute of limitations, a demurrer to the complaint pleading the statute is properly overruled. The statute does not begin to run against such cause of action from the date of the order for the issuance of the bonds, nor from the date of a contract therefor, but only from the date of the delivery of the bonds for a valuable consideration, and as to any bonds delivered within the statute and bonds not issued the cause of action is not barred.

ID.—COMPLAINT BY TAXPAYERS—OFFER OF RESTITUTION OF CONSIDERATION OF BONDS—MAXIM OF EQUITY INAPPLICABLE.—A complaint by persons who are land owners and taxpayers in an irrigation district to cancel the bonds of the district which have been illegally ordered to be issued, and who, in the nature of the case, are unable to restore the consideration received by the district for the issuance of the bonds, need not aver or show an offer of such restitution by the plaintiffs or by the district. In such case the maxim that "he who seeks equity must do equity" is inapplicable. The cause of action is not one for rescission; and the taxpayers are not required to do equity as a condition of the relief sought.

ID.—EQUITIES OF BONDHOLDERS—SHOWING AT TRIAL—PROTECTION AGAINST DISTRICT.—If, at the trial, the bondholders should show sufficient equities against the district, assuming that the district and its directors are properly made defendants, such equities may be protected by the court while awarding to the plaintiff the relief sought.

ID.—DEMAND UPON DISTRICT NOT REQUIRED.—The taxpayers plaintiff are not required to make any demand upon the district to bring the action, and need not aver such demand in their complaint.

ID.—PARTIES—IRRIGATION DISTRICT AND DIRECTORS.—In order to secure the relief sought of restraining the levy of an assessment to pay the illegal bonds and to restrain the further disposition of unissued bonds, the district is both a proper and a necessary party defendant; and its directors are proper parties for the purpose of reaching and restraining the corporation.

ID.—JOINDER OF PLAINTIFFS.—The taxpayers plaintiff have a sufficient joint interest to be joined as plaintiffs.

ID.—NONJOINDER OF BONDHOLDERS.—Where the complaint makes several individuals and private corporations, holders of bonds that have been issued by the district, parties defendant, under allegations that they have no equities as against the district, a demurrer for nonjoinder of other bondholders is properly overruled. The bondholders are proper, but not necessary, parties; and though no decree would bind those not brought in, the court may grant relief as to all who are made parties to the action.

APPEAL from a judgment of the Superior Court of San Bernardino County. John L. Campbell, Judge.

The facts are stated in the opinion.

Frick & Goodcell, for Appellants.

Shirley C. Ward, Gardiner, Harris & Rodman, Charles McFarland, R. H. F. Variel, Curtis & Curtis, Cramer M. Morris, E. R. Annable, T. C. Chapman, and H. Connor, for various Respondents.

CHIPMAN, C.—Action to have certain one thousand bonds of defendant district, in part issued and in part unissued, adjudged void; to compel each of certain defendants to disclose the bonds held by him, and to bring them into court to be canceled and destroyed, and meanwhile to restrain the transfer of such bonds; to enjoin the district from levying any assessment to pay any interest upon all or any of said bonds, and for general relief.

Defendants demurred to the complaint on several grounds. The court sustained the demurrers on the ground of insufficiency of facts and overruled them on all other grounds. Plaintiffs declined to amend, and defendants had judgment, from which plaintiffs appeal.

The plaintiffs are land owners and taxpayers in the defendant irrigation district and prosecute the action for the benefit of themselves and all other taxpayers of the district. The defendants are the district, its board of directors, and several individuals and private corporations, holders of bonds that have been issued by the district.

Appellants claim that the bonds are, upon the facts alleged in the amended complaint, absolutely void; that the defendant holders have no equities as against the district or the plaintiffs, and, if they have, those equities may be protected by proper decree; and in either case plaintiffs are entitled to all or some part of the relief prayed for.

The demurrers were upon the grounds of insufficiency of facts; that the action is barred by the statute of limitations; that plaintiffs have been guilty of laches and unreasonable delay in bringing the action, and some other grounds.

It is unnecessary to state the full scope of the very lengthy complaint in detail. Respondents concede that the alleged infirmities of the bonds are fatal to their validity, and the demurrers admit that the respondents purchased the bonds with actual notice of their invalidity. That the complaint states facts sufficient to constitute a cause of action may be assumed, and the judgment must be reversed unless some one of the grounds of demurrer can be sustained. Such as are now relied on by respondent will have attention.

1. The effect of the order was to overrule the demurrers in their entirety. The court could not so limit its order as to preclude the demurrants from their right to be heard here on any or all the grounds stated. The effect of the order was to give a reason for sustaining the demurrers, but this court will affirm the order, if well taken, on any ground, regardless of the reasons assigned by the court below. (*Wakeham v. Barker*, 82 Cal. 46. See, also, *People v. Central Pac. R. R. Co.*, 76 Cal. 29, 43.)

2. It is urged that the action is barred by section 343 and subdivision 4 of section 338 of the Code of Civil Procedure. The complaint shows that the bond issue was voted upon by the electors of the district November 15, 1890; that on November 17, 1890, the board of directors canvassed the returns of the election, and on that day passed a resolution adopting their form and ordering that the bonds issue. On November 21st the order was amended as to the number of bonds to be issued, and they were afterward signed, and all bore date November 17, 1890, two days after the election and on the day the votes were canvassed.

It is alleged that on December 10, 1890, the board, without lawful authority, entered into a written contract with the Semi-Tropic Land and Water Company, a corporation, by the terms of which said company agreed to develop and obtain a continuous flow of one thousand inches of water, measured under a four-inch pressure, from artesian wells to be constructed by said company upon lands outside said district, and agreed to construct pipe lines therefrom to the district in which to convey the water, and agreed to deed title to such water and pipe lines and right of way to the district, and in consideration therefor the district agreed to transfer and de-

liver to said company all of said bonds; and it was agreed that the water and pipe lines and rights of way were to be delivered in installments from time to time as said water should be developed and said pipe lines constructed, and payment was to be made by a proportionate part of said bonds, and the contract was to be wholly performed within two years after its date. It is alleged that when this contract was made that the company was not the owner of more than three hundred inches of water flowing from wells then developed, and that it was not possible by means of artesian wells or otherwise to obtain a continuous flow of over three hundred inches of water from the sources of supply referred to in the contract; that on December 22, 1890, the board, without authority, entered into another contract with the said company modifying said contract of December 10, 1890, as to some details, but not as to its general scope and purpose, nor as to the property to be delivered and conveyed, nor as to the price to be paid therefor, and purporting to ratify said contract of December 10th as modified, pursuant to which the company, on December 22, 1890, deeded to the district three hundred inches of water together with a pipe line conveying the same to the district, and thereupon the board, without authority, delivered to the company three hundred of said bonds of the par value of one hundred and fifty thousand dollars. Then follows a series of allegations showing like modification of the contract of December 22, 1890, at different periods, under which the board delivered at different times to sundry persons sundry bonds, in consideration of conveyances to the district brought about by the company, and in consideration of work and labor performed by divers persons.

The complaint shows that bonds were delivered from time to time in successive years under the original contract and its several modifications, and for work done by others than the company, and that the last delivery of bonds was on March 2, 1897, making in all up to that time eight hundred and twenty-two bonds, and leaving still in the hands of the directors when the suit was brought, unissued and undisposed of, one hundred and seventy-eight bonds.

Respondent contends that because the bonds were ordered to be issued in November, 1890, and because the contract with the water company was made in December, 1890, the statute of limitations began to run in December, 1890, and as the suit was not commenced for seven years thereafter the action is barred both by the statute and by the laches of plaintiffs.

It is true that a right of action accrued to a land owner and taxpayer of the district as soon as the first delivery of bonds was made in 1890, and possibly even before, to restrain the issue, if the prior proceedings of the board were, as is admitted, illegal and void. But it cannot be maintained that the bonds were issued in the sense of the statute until they were delivered for a valuable consideration. It was said in *Brownell v. Greenwich*, 114 N. Y. 518, speaking of certain bonds in litigation: "They bear the date of March 25, 1871, and are presumed to have been executed at that time, but executing is not issuing, for they may be fully executed but never issued.

. . . . The bonds had no legal inception, and could not become valid obligations aside from any other question, until actually delivered for a valuable consideration. Under the circumstances, we think that the delivery of the bonds to the plaintiff determines the date when his bonds were issued." The Wright act provides in section 15 that the bonds "shall be numbered consecutively as issued, and bear date at the time of their issue"; and section 16 provides that "the board shall sell said bonds from time to time, in such quantities as may be necessary and most advantageous, to raise money for the construction of said canals and works, the acquisition of said property and rights," etc. These provisions clearly contemplate successive acts which from time to time may require the issue of bonds as the work progresses. Section 42 provides that the board "shall have no power to incur any debt or liability whatever, either in issuing bonds, or otherwise, in excess of the express provision of this act," etc. The statute of limitations certainly has not barred the action as to bonds issued within the limit of the statute and as to the bonds still unissued; nor can we see how laches can be asserted in failing sooner to bring the action as to these bonds, at least so far as should be determined on demurrer. As to the bonds issued

at earlier dates we express no opinion. The demurrers go to the entire issue of bonds, and cannot prevail unless all the bonds are barred either by the statute or by plaintiffs' laches.

3. But respondents invoke the maxim that he who seeks equity must do equity, and it is claimed that plaintiffs are not entitled to recover without first restoring or offering to restore to defendants the fruits or benefits of the transaction in question. It was alleged in the complaint, what must in the nature of the case necessarily be true, that "the plaintiffs have not, nor has either of them, any ownership, possession, or control of all or any part of the lands, water rights, and other property conveyed to or received by said district as hereinbefore alleged; nor have the plaintiffs, nor has either of them, any power, authority, or control over said district, or its board of directors, or its officers, and, therefore, these plaintiffs, in the event of the cancellation of said bonds or any of them or the granting of said restraining order, cannot return or offer to return, or cause to be returned, to the defendant bond holders or any of them, all or any part of said property, and these plaintiffs have not the means or ability to pay or cause to be paid, to such bond holders, all or any part of the value of said property." Respondent contends that this is no defense to the equitable requirement, for the inability of the plaintiffs to do equity is as fatal to equitable relief as their unwillingness to do equity would be. It is claimed that the case is similar to that of a mortgagor seeking to maintain ejectment against the mortgagee without first paying the mortgage debt, which it was held in *Spect v. Spect*, 88 Cal. 437,¹ he could not do. We can see no analogy between the case of a mortgagor and that of a taxpayer who seeks relief against bonds illegally issued by the district. The taxpayer always receives some equivalent or consideration, and he never has the title to or the possession or control of the consideration or of any property of the district and is never in a position to return any of it to the bond holder. But there can be no doubt of the right of the taxpayer to sue for appropriate relief without first doing equity, otherwise he would be

¹ 22 Am. St. Rep. 314.

deprived of all remedy, for he never would be able to do equity in the manner respondents claim that he should.

Assuming for the moment that at the trial the bond holders may show sufficient equities to entitle them to a return of the consideration paid, or to the property of the district purchased with their money, and assuming that the district and its directors are properly made parties defendants, we see no difficulty in having the equities of the bond holders fully protected in the action while giving plaintiffs the relief sought by them. We do not regard the action as one for rescission. Plaintiffs seek to restrain some of the defendants—for example, the district—from any further issue of bonds alleged to be illegally ordered to be issued; they seek to have the outstanding bonds canceled, among other reasons because they are a cloud upon plaintiffs' title; they seek to have that title quieted as against the adverse claim of these bond holders, for section 17 of the Wright act makes all the real property of the district liable to assessment to pay the principal and interest of the bonds and provides that the principal and interest shall be paid by revenue derived from annual assessments upon the real property of the district; and the action in part seeks to restrain the directors from making any assessment.

We are unable to perceive any difference between this case, in some of its features at least, and ordinary cases where relief is sought against an illegal tax, which is the ultimate relief here sought. Such cases are common and are maintained by a taxpayer without his restoring or offering to restore the consideration which the municipality has received. Such a case is *Chase v. City Treasurer, etc.* 122 Cal. 540. (See also, *Devine v. Board of Supervisors*, 121 Cal. 670.)

4. But it is contended that the action can be maintained only by the district, or if by a land owner under any circumstances, it is only after he has demanded of the district to bring the suit, and it has failed or refused to do so. No such demand was pleaded. The rule upon which this ground of demurrer is based may have some application to private corporations, although where the action is to restrain the governing body of even a private corporation from doing some threatened illegal act it would seem to be idle to demand of

that body to sue itself. To restrain the levy of an assessment and to restrain the further disposition of bonds not to speak of other relief sought the district was both a proper and necessary party; it would fail as a plaintiff for it could not have relief by the court when it had the remedy in its own hands by simply abstaining from doing the alleged illegal acts. *Cogswell v. Bull*, 39 Cal. 320, relied on by respondents, was the case of a stockholder who sued, in his own name, the former directors of a private corporation for misappropriation of funds of the corporation. It was held that before he could bring the action he should have demanded of the corporation to bring the suit; but the court declined to express any opinion as to how it would hold if all the directors had at the time been the same as those against whom the suit was brought.

The suit here is not against the directors for any malfeasance; it is in part to reach and restrain the corporation itself. It was said in *Hughson v. Crane*, 115 Cal. 404, that "a demurrer for defect of parties defendant is generally but technical, and, unless the omitted party is indispensable to giving the relief sought, the court should not sustain the demurrer, but should order him brought in, if it shall be made to appear that his presence is proper for a determination of the entire controversy." And so here the fact that there is a misjoinder or nonjoinder of proper parties is not in itself sufficient ground upon which to sustain the judgment. Nor do we think the ground of demurrer well taken that the plaintiffs fail to show a joint interest. The point as to nonjoinder is based on the averment that all the bond holders are not made parties defendant. They are not necessary parties. It may be that a complete determination of the controversy cannot be had without them—i. e. no decree would bind them unless brought in—but this would not justify the court in denying relief as to those made parties. It has been held that in an action brought by a corporation whose stock has been overissued, to test the validity of the claims of holders of such stock, it is desirable, but not absolutely necessary, that all holders of spurious stock should be joined. (*New York etc. R. R. Co. v. Schuyler*, 38 Barb. 534.) For a statement of the distinction between necessary and proper parties, see section 329 of Pomeroy's Code Remedies.

In disposing of the demurrers we desire to state that it is not our purpose to express any opinion as to the merits of the controversy should the cause come to a trial. We hold only that the demurrers were not well taken, and that the merits should be disposed of after answer and full hearing at a trial.

The judgment should be reversed and the cause remanded.

Gray, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded.

Henshaw, J., McFarland, J., Temple, J.

[L. A. No. 664. Department Two.—September 5, 1900.]

CALIFORNIA MORTGAGE AND SAVINGS BANK, Respondent, v. ERNEST GRAVES et al., Appellants.

PRACTICE—WRIT OF ASSISTANCE—NOTICE OF HEARING—ORDER SHORTENING TIME.—Under section 1005 of the Code of Civil Procedure, the lower court has power to shorten the time of notice for hearing an application for a writ of assistance to three days; and where there is nothing in the record on appeal to contradict a recital in the order shortening the time that it was made for good cause, it will be presumed that the necessity for the order was made to appear, and that the power was rightly exercised.

ID.—MORTGAGE—FORECLOSURE SALE—STAY OF EXECUTION—JUDGMENT-ROLL AS EVIDENCE.—Notwithstanding the pendency of an appeal from a judgment foreclosing a mortgage of real property, the judgment-roll is admissible in evidence on an application for a writ of assistance to recover possession of the land sold at the foreclosure sale, if no undertaking staying the execution of the judgment has been given as provided in section 945 of the Code of Civil Procedure.

ID.—EVIDENCE IN SUPPORT OF WRIT—AFFIDAVIT.—On an application for the writ of assistance as against the parties to the action, the facts of the presentation of the sheriff's deed to them, the demand of possession of the land, and their refusal to surrender it, may be shown by affidavit.

ID.—APPEAL FROM ORDER FOR WRIT—PRESENTATION OF DEED—DEMAND. On an appeal from an order granting a writ of assistance against two defendants, as to only one of whom the record affirmatively

showed that the sheriff's deed was prosecuted and a demand of possession made, it will be presumed, in the absence of evidence to the contrary, that the evidence before the court on the hearing showed that the other defendant had no such interest as necessitated the presentation of a deed or the making the demand.

APPEAL from an order of the Superior Court of San Luis Obispo County granting a writ of assistance. E. P. Unangst, Judge.

The facts are stated in the opinion.

Graves & Graves, for Appellants.

Venable & Goodchild, for Respondent.

CHIPMAN, C.—Appeal by defendants from an order granting a writ of assistance.

1. It is claimed that the court erred in shortening the time for hearing the application for the writ from five to three days.

The power to shorten the time is given by section 1005 of the Code of Civil Procedure. The order of the court reads: "Good cause appearing to me therefor, it is ordered," etc. There is nothing in the record to dispute this recital, and we must presume that the necessity for the order was made to appear, and that the power was rightly exercised.

2. Appellant claims that the judgment-roll in this case was improperly admitted in evidence because the case is on appeal to this court and is deemed to be pending. (Citing Code Civ. Proc., sec. 1049; *In re Blythe*, 99 Cal. 472; *Naftzger v. Gregg*, 99 Cal. 83¹; *Murray v. Green*, 64 Cal. 363.) But section 945 of the same code provides that if the judgment appealed from "direct the sale . . . of real property, the execution thereof cannot be stayed, unless a written undertaking be executed on the part of the appellant . . . that he will not commit any waste thereon, and that if the judgment be affirmed, or the appeal dismissed, he will pay the value of the use . . . of the property," etc.; and "where the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must provide for the payment of such deficiency."

No stay bond was given in the present case, but simply the ordinary appeal bond as provided by section 441 of the Code of Civil Procedure. The cases cited by appellant do not reach the point made by him. The evidence was admissible, and the writ could issue notwithstanding the appeal. (*Montgomery v. Tutt*, 11 Cal. 190.)

3. Appellant contends that in "order to obtain the writ it was necessary for plaintiff to have furnished the court proper evidence of a presentation of a sheriff's deed, a demand for the possession of the realty, and a refusal on the part of the defendant to surrender possession," and that the only evidence of these facts introduced by plaintiff was the affidavit of one of plaintiff's attorneys, which it is claimed, "cannot be proper evidence of anything." The affidavit showed that plaintiff had obtained a deed from the sheriff, and that affiant, for plaintiff, "presented said deed to defendant Ernest Graves, and demanded possession of said land; and that said defendant refused the same to the bank." The affidavit was uncontradicted and was proper evidence of the fact. (Code Civ. Proc., secs. 2002, 2009.) Section 2009 provides that "an affidavit may be used . . . upon a motion." It was said in *Montgomery v. Middlemiss*, 21 Cal. 103²: "All that is requisite to obtain the writ, as against the parties and those claiming with notice under them after the commencement of the action, is to furnish to the court proper evidence of a presentation of the deed to them, and a demand of possession, and their refusal to surrender it." Such evidence, we think, could properly be furnished to the court by affidavit.

4. There is no evidence by affidavit or otherwise that the deed was presented to defendant Lucinda Graves, or any demand for possession made upon her.

It was admitted that both defendants were served with notice of the motion, and both defendants in fact appeared by counsel at the hearing, and both appeal to this court; the judgment-roll and the proceedings leading to sale and sheriff's deed were admitted over defendants' objection to their relevancy, materiality, and competency, the ground of objection being that the cause is pending on appeal to the supreme court. The papers on which the hearing was or-

dered were objected to because no sufficient notice of plaintiff's application for a writ had been given and because the judge had not power to shorten the time for the hearing. No objection to the issuing of the writ was made on the ground that the deed had not been presented to Lucinda, nor on the ground that no demand for possession had been made upon her. She is spoken of in the briefs as the wife of Ernest, and she doubtless bore that relation to him. It does not appear what her interest in the property was. The judgment-roll is not printed in the record, nor are the proceedings subsequent to the decree, nor is the deed. Appellant now claims that it was error to grant the writ upon this evidence. It seems to me that it is sufficient in answer to appellants' contention to say that, in the absence of evidence to the contrary, we must presume that the evidence before the court showed that Lucinda had no such interest as required the deed to be presented to her and demand made upon her for possession after these steps had been taken as to her husband. Respondent suggests, with some reason, that the rule of practice which requires a demand before applying for the writ is a rule for the benefit of the court and not for the defendants; that the reason for making the demand is that the applicant for the writ can show to the court that he has no other remedy, without which the court of chancery would not aid him (*Montgomery v. Tutt, supra*); it is hence argued that having made the demand upon the husband, there was no necessity for showing like demand upon his wife. The difficulty in thus holding is that the wife and not the husband may have owned the mortgaged premises as her separate property, in which case demand upon her husband would not excuse demand upon her. The objection, however, in the present case, is obviated by the presumption already stated.

The order should be affirmed.

Cooper, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed. Henshaw, J., McFarland, J. Temple, J.

[Sac. No. 713. Department Two.—September 5, 1900.]

PAUL MEYER, Respondent, v. WILLIAM PARSONS et al., Defendants. A. C. BOWLES, Appellant.

SALE—PROMISE BY PURCHASER TO PAY INDEBTEDNESS—CONSIDERATION—DAMAGES FOR BREACH—ACTION BY VENDOR—RESCISSION—PAYMENT.—A promise made by the defendants to the plaintiff, upon a sale and delivery to them by the plaintiff of a half-interest in a saloon, to pay all indebtedness previously incurred in the business by plaintiff and one of the defendants to an amount specified, is part of the consideration of the transfer, and the vendor may recover the full amount of the indebtedness as damages for its breach, without being required to rescind the contract of sale, and without having first paid the indebtedness himself. The damages are the same, whether the plaintiff has already paid the creditors or must yet inevitably pay them.

ID.—EXTENT OF RECOVERY—POSSIBILITY OF NONEXACTION.—The extent of the plaintiff's recovery in the full amount of the indebtedness as damages is not affected by the possibility that the creditors may not exact all that they are entitled to in discharge of their claims. The extent of the liability of the defendants to the plaintiff is the full amount agreed to be paid for the property.

ID.—LIABILITY OF NEW PARTY TO CREDITORS IMMATERIAL.—Whether the defendant who came into the business as a new party and promised to pay the creditors is liable to the creditors or not, and whether he can be protected except as to costs by paying the creditors, or cannot be so protected, the position in which he is placed by his contract with plaintiff is to be deemed his own fault, and should not prevent the court from giving to the plaintiff the benefit of the contract between them where there has been no novation thereof.

ID.—PROMISE TO PAY INDEBTEDNESS OF OTHERS—STATUTE OF FRAUDS—CONTRACT OF SALE.—The promise of such defendant to pay the indebtedness of the plaintiff and his codefendant which entered into a contract of sale, accompanied by the delivery of the property, is not a promise to answer for the debt or default of another within the statute of frauds.

ID.—INSTRUCTIONS—OMISSION OF QUESTION OF PARTNERSHIP.—Where one of the defendants who had been in the saloon business with the plaintiff had made default upon the trial of issues joined by the other defendant, instructions given are not objectionable upon the ground that allusion to the defaulting defendant, and the question of partnership relation between him and the plaintiff, or between him and the defendant, are ignored and omitted.

1D.—HARMLESS INSTRUCTION AGAINST LIABILITY TO CREDITORS.—An instruction to the effect that the creditors could not hold the defendant liable against whom the case was tried, whether sound or not, is harmless, and could not be prejudicial to the defendant.

1D.—EVIDENCE—VALUE AND AMOUNT OF STOCK IN SALOON.—The value or amount of the stock in the saloon at any other time than when the sale was made is not relevant to the matter in issue, and evidence thereof is inadmissible.

1D.—IMMATERIAL UNCERTAINTY IN VERDICT—INTEREST ON NOTE—MATTER WITHOUT DEFENSE.—An uncertainty in the verdict as to the matter of interest on a note, in respect to which there was no defense, is immaterial.

1D.—SUBSEQUENT ASSUMPTION OF LIABILITY BETWEEN DEFENDANTS IMMATERIAL.—Where the evidence clearly proves that both of the defendants assumed to pay the debts for which the plaintiff was liable in consideration of the sale to them of his interest in the saloon, evidence of any subsequent agreement or assumption of liability as between the defendants, upon a sale from one of them to the other, is immaterial, and is properly rejected.

APPEAL from a judgment of the Superior Court of Solano County and from an order denying a new trial. A. J. Buckles, Judge.

The facts are stated in the opinion.

M. B. Harrison, Peter J. Shields, and Hiram W. Johnson, for Appellant.

John M. Gregory, for Respondent.

GRAY, C.—Plaintiff had judgment by default against defendant Parsons. The defendant Bowles answered, and on a trial the verdict and judgment were against him. From said judgment and from an order denying him a new trial the defendant Bowles appeals.

The complaint in the case sets forth facts showing a sale and delivery to defendants, and each of them, of a one-half interest in a saloon and fixtures and materials for carrying on said saloon, and alleges that the consideration for said sale was \$250 and an agreement on the part of defendants, and each of them, to pay certain debts owing by plaintiff and defendant Parsons amounting in the aggregate to \$814.60. It is also averred that the promise to pay the \$250 is evidenced

by a promissory note executed by defendants to plaintiff for said sum of \$250 and interest at eight per cent per annum from December 3, 1897. It is alleged that no part of the note has been paid except \$100 on February 4, 1898, and that defendants and each of them have refused on demand to pay said indebtedness of \$814.60, and that defendants have had more than a reasonable time to pay the same, and no part thereof has been paid, and that the creditors are pressing plaintiff for payment. The prayer is for judgment: 1. For said sum of \$814.60; 2. For said sum of \$250 due on the note, with interest as in said note specified, after deducting said sum of \$100 paid on February 4, 1898.

The original answer to the complaint expressly admits the willingness of appellant to pay the balance due on the note, and contains an offer to allow plaintiff to take judgment against him for the amount alleged by plaintiff to be due on said note. In the amended answer, upon which the case was tried, the defendant denies the purchase of the property and the promise to pay anything on account thereof, and alleges that plaintiff sold the property to defendant Parsons alone. Appellant then admits the execution of the note, but avers that he signed it only as surety to enable Parsons to purchase the saloon. It is not claimed by appellant, either in the answer or elsewhere, that he has any defense to the note. On the trial the jury returned a verdict in the following form: "We, the jury in this cause, find for the plaintiff Paul Meyer in the sum of \$814.60; also \$150 with interest."

1. Appellant contends that if all that is claimed by plaintiff is true, yet he is not entitled to recover the \$814.60, because he has not paid the same himself, and because the agreement was not that appellant should pay the plaintiff that amount, but that he should pay it to the creditors.

In answer to this it is sufficient to say that the promise to pay the creditors was made to plaintiff, and that on a failure to keep that promise plaintiff is entitled to recover whatever damages he has sustained by reason of such failure. He is not compelled to rescind nor to treat the contract as rescinded, but may rely upon the contract and recover damages for its breach, and this is, as we understand it, just what he is en-

deavoring to do in this suit. His damages in that regard are the same whether he has already paid the creditors or must yet inevitably pay them. There is no question but that he is yet liable to the creditors, and the extent of his right of recovery is not affected by the possibility that the creditors may not exact all that they are entitled to in discharge of their claims. The extent of appellant's liability is the amount that he agreed to pay for the property; and plaintiff can recover this full amount even though he has not paid it himself. (Sedgwick on Damages, sec. 789, and cases there cited; *Banfield v. Marks*, 56 Cal. 185.)

It is needless to determine whether the creditors of plaintiff and Parsons have a right of action against appellant or not, for, be that as it may, there being no novation plaintiff certainly has a right of action, and the right of the creditors to an action against the appellant, if any exists, can be extinguished by paying the creditors, and, as is said in *Rector etc. of Trinity Church v. Higgins*, 48 N. Y. 532, 539: "A court of law is vested with such equitable power that, upon application after such payment, proceedings for the collection of the judgment, except as to the costs, would be stayed, and, upon payment of the costs, satisfaction of the judgment would be ordered." But even where it is held that the course suggested above cannot be pursued, still the position in which the appellant finds himself is deemed to be the result of his own fault, and should not prevent us from giving to the plaintiff the benefit of the contract he has made. (*Furnas v. Durgin*, 119 Mass. 500, 508.¹)

2. The contract between plaintiff and defendants was not one to answer for the debt or default of another, but was a contract of sale accompanied with a delivery of the property sold; it was not, therefore, within the statute of frauds.

3. Two instructions given to the jury are complained of because they leave out of consideration entirely the defendant Parsons and ignore the question of partnership. The defendant Parsons had made default, and the trial was not being had for the purpose of testing his liability, but only to determine the liability of Bowles. It was not necessary, therefore, to enlighten the jury as to the liability of Parsons. Nor

¹ 20 Am. Rep. 341.

was it necessary to say anything to them about any partnership relation either between Meyer and Parsons, or between Parsons and Bowles. The defendants are not sued as partners, and there is no plea or theory of partnership in the case that it was necessary to explain to the jury. Meyer was responsible to the creditors for the whole amount of the indebtedness of himself and Parsons, and the appellant Bowles was in turn responsible to plaintiff for the full amount of the damages resulting from the breach of the contract involved in the suit, and both these propositions are true conceding all that can be claimed as to the existence of partnerships. If it be conceded that the statement "The creditors could not hold Bowles" was not sound as a proposition of law, still this could not have injured appellant, because, as we have already seen, the plaintiff is entitled to recover whether a right of action against appellant existed in favor of the creditors or not. As to the matters pointed out by appellant, therefore, there was no prejudicial error in the instructions.

4. The value of the amount of the stock in the saloon at any time other than when the sale was made could not possibly throw any light on any matter in issue, and the objections to evidence looking to those matters were properly sustained.

5. The verdict was not as certain as it might have been as to the matter of the interest on the note, but, as to said note, the plaintiff was entitled to judgment on the pleadings, no defense thereto having been set up. The alleged uncertainty in the verdict is therefore immaterial.

6. Both plaintiff and Parsons testified substantially that Parsons and Bowles together bought Meyer's interest in the saloon and agreed to pay the debts of the firm composed of Meyer and Parsons. Some of the answers of Meyer, separated from the rest of his testimony, might bear the construction given it by the appellant that he intended to say that the sale was made to Parsons alone, but, reading his testimony, altogether, it is clear that he intended to testify and did testify that "Bowles and Parsons bought me out. The note was signed by both. That was the understanding between us; both of them bought me out." And, again, he said, "They promised to pay the bills below." Parsons' testimony is to the

same effect and entirely free from ambiguity, and other witnesses testified to corroboratory facts. Bowles himself must have known of the facts in reference to the sale, but for some unexplained reason he does not testify at all. The evidence clearly shows the sale to Parsons and Bowles and that they promised to pay the debts of Meyer and Parsons.

7. On the cross-examination of Parsons he was asked: "Did you not bring an action against Mr. Bowles for this very same thing in addition to that two hundred and fifty dollars he assumed to Meyer, and the three hundred dollars he paid you when he surrendered up your note, and then, as you have sworn here in your complaint, that he assumed the payment of the thousand dollars for you at that time? Also when he bought you out? Do you tell this jury that he assumed both of these?" An objection by the plaintiff was made to this question, and appellant excepted to the court's action in sustaining the same. It is somewhat difficult to discover the meaning of the above question, but it seems reasonable to suppose that it refers to a suit brought by Parsons against Bowles on account of a sale by the former to the latter of the interest of the former in the saloon; for it appears that such a sale took place some months after the sale involved in this case; and to properly understand the last part of the question it should read like this: "Do you mean to tell this jury that Bowles and you first assumed and agreed with Meyer to pay the indebtedness of Meyer and Parsons, and then when he bought you out Bowles again agreed with you to assume and save you harmless from that same indebtedness?" If the above is the meaning of the question it certainly contains an inquiry as to an immaterial matter; and if such is not its meaning we do not understand it, and in either event we find no error in the ruling of the court. The fact that no ground was stated by counsel for the objection to the question does not alter this view.

We advise that the judgment and order appealed from be affirmed.

Chipman, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Henshaw, J., McFarland, J., Temple, J.

[S. F. No. 1715. Department One.—September 12, 1900.]

COUNTY OF SONOMA, Appellant, v. GILBERT P. HALL
et al, Respondents.

ACTION UPON OFFICIAL BOND—DELIVERY OF RECORDER'S FEE-BOOK TO AUDITOR—CONSOLIDATED OFFICE—SUPPORT OF FINDINGS AND JUDGMENT.—In an action by a county upon the official bond of the county recorder to recover damages for his alleged failure to deliver his fee-book to the county auditor at the expiration of his term, findings made upon sufficient evidence that the offices of county auditor and recorder were consolidated, and that the fee-book was in its proper place among the auditor's books when the office was delivered to his successor, sustain a judgment for the defendants, and it is immaterial whether or not findings as to the value of the book and the amount of damage from its loss are or are not supported by the evidence.

ID.—EVIDENCE—REBUTTAL—COPYING DONE BY CLERK—ORDER STRIKING OUT—PRESUMPTION.—Evidence offered in rebuttal that copying was done in the office by a clerk at the dictation of the recorder, which was not properly in rebuttal, and which did not show that the copying was from the fee-book in question, was properly stricken out by the court. It cannot be presumed that the book dictated from was such fee-book, nor that the witness was making a false and pretended copy thereof, nor that the testimony was admissible for any purpose not shown by the record.

ID.—CROSS-EXAMINATION OF DEFENDANT—PROPER PRACTICE—HARMLESS RULINGS.—Where the defendant had testified in chief that he had left the fee-book in question in the usual place in the office, it would be proper practice to allow questions to be asked on cross-examination as to whether or not he kept two sets of fee-books, and whether he had not, with the assistance of a copyist, made a duplicate of the fee-book in question; but where the witness testified in other parts of his cross-examination that he never had but one fee-book, and never kept two sets of fee-books, and no questions were addressed to showing that he left a duplicate or a false copy in the office, a ruling against the questions asked is not of sufficient importance to justify a reversal of the judgment.

APPEAL from a judgment of the Superior Court of Sonoma County and from an order denying a new trial.
J. M. Mannon, Judge.

The facts are stated in the opinion.

Emmet Seawell, District Attorney, and J. R. Leppo, for Appellant.

Anson Hilton, and J. P. Rodgers, for Respondents.

COOPER, C.—This action was brought by the plaintiff against defendant Hall as principal, and the other defendants as sureties, on Hall's official bond given by him as recorder of Sonoma county, to recover damages for a breach of said bond in failing to deliver to the county auditor on the expiration of his term of office a certain fee-book in which was entered the fees and compensation chargeable and collected by defendant Hall as county recorder during a portion of his term of office.

The case was tried before the court, findings filed, and judgment ordered for the defendants. Plaintiff has appealed from the judgment and from the order denying its motion for a new trial. The principal argument of appellant is directed to an attack upon a portion of finding numbered 2 as being without support in the evidence. The portion of the finding so attacked is as follows: "That at the time defendant Hall turned over said offices of recorder and auditor to his successor, upon the expiration of his official term, fee-book No. 13, referred to in the complaint, was in its appropriate place in the auditor's department of said combined office, and was delivered to his successor in office as required by law."

In the first part of finding 2 the court finds that during all the times mentioned in the complaint the offices of county recorder and auditor of Sonoma county were consolidated, and that defendant Hall held both offices. That all the records and papers belonging to the recorder and auditor were kept in the same office. That the successor of defendant Hall, as recorder, also succeeded him as auditor. These portions of finding 2 are not attacked. We have carefully examined the evidence, and after such examination think the portion of the finding attacked is supported.

The defendant testified that Mr. Atchinson, who succeeded him, was in the office for some three weeks before it was turned over to him. That he saw the book on the day that he went out of office and that it was then in a case used for filing away the auditor's books in the hall of records. That this

was the seventh day of January, 1895, the day Hall went out of office. That he never removed the book from that time, and that no one else did to his knowledge. That he showed the book to Atchinson.

The witness Coulter, who was a deputy in the office, testified that he saw the book in a case in the hall of records two or three days prior to the end of Hall's term of office, and that he afterward saw it in the latter part of March, 1895, in the vault of the county assessor's office in the courthouse.

Miss Bishop, who was a deputy under Hall, testified that she saw the fee-book in the office where the records were kept on the morning of January 7, 1895, being the morning the office was turned over to Atchinson. The above testimony amply supports the finding. The truth of the testimony, and the credit to be given to witnesses, were matters peculiarly within the province of the trial judge. We do not possess the power, neither have we the inclination, to interfere with the functions of the trial judge in weighing testimony.

Portions of findings numbered 3, 4, and 5 are claimed to be without support in the evidence. These findings relate to the amount of damage suffered by plaintiff by reason of the loss of the book and the value of the book. The gist of the action is the failure of defendant Hall to turn the book over to his successor and the alleged appropriation thereof to his own use. As already shown, the court found that the defendant turned the book over to his successor, and the finding is supported by the evidence. It is therefore apparent that the defendants are not responsible to plaintiff for damage caused by the loss of the book, and the question as to whether or not the findings as to damages and the value of the book are supported by the evidence becomes an immaterial matter. No matter what the value of the book, nor the loss to plaintiff, the defendants are not responsible therefor in view of the second finding.

One Goodwin was called by plaintiff as a witness in rebuttal and testified that he was employed by defendant Hall during Hall's official term, and about October or November, 1892, for five or six evenings, copying in the recorder's office. That Hall dictated to witness from a large leather book, and the

witness copied into another book similar in size and appearance. The testimony was given under defendant's objection, and the court evidently allowed it out of abundance of caution and with the belief that plaintiff would show its materiality. At the close of the testimony the court made an order striking it out upon the ground that it was in no way rebuttal, and that the witness did not appear ever to have seen fee-book 13, and the alleged copying was in no way connected with the loss of the book.

We think the ruling of the court was correct. Counsel has failed to point out how the evidence could be even claimed to be in rebuttal, and we have been unable to discover anything in the record which it tended to rebut. It is argued that the testimony tended to show that Hall was making a false fee-book for the original No. 13. This could not be the effect of the testimony unless we are to presume that the book from which Hall was dictating was fee-book No. 13, and that the witness was not only making a copy but a false and pretended copy of said book. We cannot presume that the testimony was admissible for any purpose except such purpose as we can find in the record and the rational legal inferences therefrom. The defendant Hall was asked two or three questions in cross-examination as to whether or not he as recorder kept two sets of fee-books, and if he did not with the assistance of a copyist, make a duplicate of No. 13. These questions were objected to and the objections sustained upon the ground that they were not proper cross-examination and immaterial. It is argued that the questions should have been allowed for the purpose of showing that the book turned over by Hall was a duplicate and not the original. If such was the purpose of the questions, the direct question should have been asked in such manner as to show the aim of counsel. Hall had, in direct examination, testified that he left the fee-book in the office in the usual place. Counsel had the right in cross-examination to show that this statement was not true, but if it could have been shown, the question should have been as to whether or not the book left was the original or a duplicate. The witness in other parts of his testimony said that he never had but one fee-book No. 13 and that he never kept two sets of fee-books. While it would, perhaps, have been

better practice for the court to have allowed the questions, we do not think the rulings, even if error, of sufficient importance to justify a reversal of the case. The questions were not directed to the purpose of showing that a book was made or manufactured which was false and not in fact a duplicate. If the questions had been asked in such manner as to clearly show the object to be the solicitation of evidence tending to show that a false fee-book was made by defendant Hall, and that this book and not the original was the one left in the office, the court no doubt would have allowed them. We have examined the other alleged errors and find nothing therein that would justify a reversal of the case.

The judgment and order should be affirmed.

Chipman, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Van Dyke, J., Garoutte, J.

[L. A. No. 614. Department One.—September 12, 1900.]

J. W. MABB et al., Appellants, v. H. H. MERRIAM Respondent.

REFORMATION—SUBSTITUTION OF PARTIES TO CONTRACT.—A court of equity, in the exercise of its jurisdiction to reform written contracts, has no power to make a new contract. It can neither add additional parties to nor substitute other parties for those already appearing upon the face of the writing.

APPEAL from a judgment of the Superior Court of Los Angeles County and from certain orders made on the trial. Waldo M. York, Judge.

The facts are stated in the opinion of the court.

J. L. Murphy, and Murphy & Gottschalk, for Appellants.

Jefferson Chandler, and Shirley C. Ward, for Respondent.

GAROUTTE, J.—This is an action brought to reform a contract and to recover damages for an alleged breach thereof. The question arising upon the appeal is presented upon the face of the complaint.

We will consider the single proposition, Do the facts alleged justify a reformation of the contract as prayed for? The facts are these: Plaintiff J. W. Mabb and defendant Merriam verbally agreed to exchange lands. Plaintiff J. J. Mabb was the husband of his coplaintiff, and in conjunction with one Streeter, the agent of both parties, attended to the drawing up of the preliminary contract. In this contract the name of J. W. Mabb is not mentioned, but the instrument recites that J. J. Mabb is the party of the second part, and as such party he enters into many covenants to perform, etc. He also signed the contract as one of the parties thereto. J. W. Mabb, the wife, now seeks to have the contract reformed by having her name inserted as the party of the second part, and also having her name attached thereto in place and stead of J. J. Mabb.

While a court of equity will reform contracts under many varying circumstances, still it has no power to make a new contract. Its power is simply to reform a contract already made. J. W. Mabb is not a party to the contract, and a court of equity can neither add additional parties nor substitute other parties for those already appearing upon the face of the writing. J. J. Mabb acted as one of the contracting parties, and whether he did it by mistake, through ignorance of law or fact, or did it with knowledge of everything, we deem an immaterial matter. A court of equity cannot change an agreement between J. J. Mabb and Merriman to an agreement between J. W. Mabb and Merriman. This would be to make a new contract, and not to reform a contract already made.

For the foregoing reasons the judgment and orders appealed from are affirmed.

Harrison, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

[L. A. No. 616. Department Two.—September 12, 1900.]

J. H. MADDUX, Appellant, v. COUNTY BANK OF SAN
LUIS OBISPO, Respondent.

MORTGAGE—DEFAULT JUDGMENT—PAYMENTS TO MORTGAGEE PENDENTE LITE.—A mortgagee who receives the entire amount of the mortgage indebtedness from the proceeds of a foreclosure sale had under a judgment obtained upon the default of the mortgagor to answer the complaint is liable to account to the mortgagor for all moneys received by him between the filing of the complaint in foreclosure and the sale, which by the terms of the contract between them should have been credited on the mortgage indebtedness, but for which no credit was given.

APPEAL from a judgment of the Superior Court of San Luis Obispo County and from an order refusing a new trial.
E. P. Unangst, Judge.

The facts are stated in the opinion.

William Shipsey, for Appellant.

W. H. Spencer, for Respondent.

CHIPMAN, C.—Action to recover certain money alleged to have been received by defendant between the filing of a complaint by it on foreclosure and the making of the default decree, and the sheriff's sale thereunder, for which no credit was given. Defendant had judgment, from which and from the order denying his motion for new trial plaintiff appeals. The complaint sets forth the following among other facts:

Plaintiff and one Branch executed a mortgage on certain lands to First National Bank of San Luis Obispo to secure the payment of their note for eleven thousand seven hundred and seven dollars and eighty-one cents; the mortgagee subsequently assigned the note and mortgage to defendant bank, and to this latter bank Branch gave an additional mortgage to secure the payment of the same note; when the first note and mortgage were executed, and contemporaneously therewith the mortgagee entered into a written agreement with the mortgagors by which the mortgagee agreed to release certain of the lands to grantees of the mortgagors upon payment

to it of certain amounts per lot of certain lands and a certain amount per acre of certain other lands; this agreement was assigned to defendant with the note and mortgage and became the agreement of defendant; on June 17, 1896, defendant commenced its action to foreclose the mortgages, at which time there was due on the note a certain sum not now disputed. Branch, this plaintiff and certain of their grantees were defendants, and Branch and Maddux (plaintiffs here) were duly served with summons, but did not appear in the action and their default was entered, and on April 13, 1897, a judgment of foreclosure was duly made and entered by default, and on May 15, 1897, sufficient of the mortgaged lands were sold by the sheriff to pay the amount due on the note, principal and interest and costs and charges of foreclosure, and the judgment was satisfied. It is alleged that between the commencement of the suit and the foreclosure sale the sum of five thousand five hundred and sixty-four dollars was paid to defendant by grantees of Branch and Maddux and by themselves for the purpose of obtaining releases of certain of the mortgaged lands, which by the agreement aforesaid defendant agreed to credit on the mortgage note, but that it credited thereon only four thousand one hundred and fifty-six dollars and leaving a balance of fourteen hundred and eight dollars, for which no credit was given on the note or on the judgment.

The foregoing facts are sufficient to an understanding of the only point presented for decision.

Plaintiff called the cashier of defendant bank as a witness, by whom he sought to prove payments made to the bank after the foreclosure suit was commenced which were not credited on the note or on the judgment before sale. Some of these payments were alleged to have been made both before and after judgment. The evidence was refused by the court upon the objection that plaintiff was estopped by the judgment to prove any such payments. Plaintiff was also sworn as a witness in his own behalf to make similar proof, but the evidence was refused on the same grounds. Both parties seem to agree that the question is fairly presented and is the only question involved in the appeal, as it is the only question discussed.

No greater effect is imparted by the adjudication of a fact denied than is imparted by an adjudication of the same fact after being expressly admitted, or admitted by implication, as in the case of default. (Freeman on Judgments, sec. 330, and cases there cited.) A judgment by default stands on the same footing as a judgment after answer and trial with respect to issues tendered by the plaintiff's complaint. Mr. Freeman says that the general expression, often found in the reports, that a judgment is conclusive of every matter which the parties might have litigated in the action is misleading. (Freeman on Judgments, sec. 249.) He says: "It may be that the plaintiff might have united other causes of action with that set out in his complaint, or that the defendant might have interposed counterclaims, cross-bills and equitable defenses, or either of the parties may have acquired new rights pending the litigation, which might, by permission of the court, have been pleaded by supplemental complaint or answer, and therefore might have been litigated in the action. But as long as these several matters are not tendered as issues in the action they are not affected by it. . . . The defendant must bring forward all the defenses which he has to the cause of action asserted in the plaintiff's pleadings at the time they were filed."

In some early cases in Massachusetts it was held that in a suit on a promissory note where the defendant made default he could afterward sue the plaintiff in that action for money paid but not credited on the note (*Fowler v. Shearer*, 7 Mass. 14; *Rowe v. Smith*, 16 Mass. 306); and it was so held at one time in New York. (*Smith v. Weeks*, 26 Barb. 463.) But in the later cases in both of those states the earlier cases were expressly overruled. (*Fuller v. Shattuck*, 13 Gray, 70; *Binck v. Wood*, 43 Barb. 315, affirmed by the court of appeals.) Mr. Bigelow cites several cases where it was held that partial payments made before suit cannot afterward be recovered whether the defendant in the original action made default or answered. (Bigelow on Estoppel, 76, 77.) In *Binck v. Wood*, *supra*, the court said: "The law cannot uphold the trust and faith that allow a man to lie by, as the plaintiff here did in the first suit, and rest upon the belief that the plaintiff there would not do what in the summons or complaint he had expressly notified this plaintiff he would do,

namely, take judgment for the whole amount of the note, and then maintain an action to recover back part of the judgment on the ground that his just confidence had been betrayed." In that case, however, the partial payment claimed to have been made and not credited was made before suit was commenced. Commenting upon this case and the doctrine held in like cases Mr. Bigelow says: "This appears to be the better opinion. The meaning simply is that judgment by default, like judgment on contest, is conclusive of what it actually professes to decide as determined by the pleadings; in other words, that facts are not open to further controversy if they are necessarily at variance with the judgment on the pleadings."

I find cases decided in other states in support of the rule laid down in Massachusetts and New York, where partial payments had been made both before and after suit brought, and the defendant had appeared in the action but failed to set up the payments in defense. In these cases he was held estopped from recovering afterward by separate action.

But I find no case where the defendant did not appear and plaintiff had a default judgment, that the defendant was estopped from recovering money received by the plaintiff after the action was commenced that should have been but was not credited on the claim sued upon or taken account of in the judgment.

When the defendant fails to appear to the action, and allows his default to be entered, he admits the truth of the facts alleged in the complaint and all facts necessarily incidental to such facts and to the enforcement of the claim there set forth. Branch and Maddux, for example, in the present case, admitted that they were indebted to plaintiff in the foreclosure suit the sum claimed in the complaint when it was filed; they did not admit anything beyond this as to the indebtedness. Obviously, they did not admit that the plaintiff might take judgment for the full amount claimed, notwithstanding money might come into plaintiff's hands from third parties which it had agreed to credit on the note and which in conscience it was its duty to so credit. The best and most variable test as to whether a former judgment is a bar, says Mr. Freeman, is to inquire whether the same evidence will

sustain both the present and the former action. (Freeman on Judgments, sec. 259.) The evidence which justified the judgment against Branch and Maddux in the foreclosure suit was their admission that at the time the complaint was filed they were indebted the amount therein claimed. The admission related to the facts as they existed at the commencement of the action. If at that time the plaintiff claimed too much, and there had been payments previously made which were not credited, it was the duty of the defendants in that action to so show by answer, as we have already seen, or they would be estopped; but the reason underlying this rule does not apply where it appears, as here, that money came into the hands of the plaintiff in the foreclosure suit, after suit brought, which it had agreed to credit but failed to do so, and of which defendants in that suit had no knowledge. The defendants might well have allowed their default to stand, relying on the plaintiff to make the proper credits before judgment, or if paid after judgment to still give the credit before enforcing the judgment. It would be unconscionable to allow the plaintiff in such a case to shield himself by claiming that the defendant is estopped to prove that the plaintiff received the money and failed to credit it. It is true that the judgment, though for too great an amount, could be enforced unless set aside by some appropriate proceeding. But we do not think it can be used as a shield to protect the plaintiff in that action from liability for money received by plaintiff under the circumstances alleged in this case. As was said in *Barton v. Anderson*, 104 Ind. 578: "The general rule is that a default is only conclusive as to such matters as are properly averred or charged in the complaint." (See, also, *Bigelow on Estoppel*, 85. See, also, *Cromwell v. Sac County*, 94 U. S. 351, for a clear statement of the rule by Mr. Justice Field.)

Respondent relies upon *Woolverton v. Baker*, 98 Cal. 628, and *Reed v. Cross*, 116 Cal. 473. In both these cases it clearly appeared that the precise point in issue in the second action was litigated in the first. In both cases there were answers and the causes were fully tried. The distinction we make in the application of the principles enunciated in the two cases cited is that the facts adjudged in the foreclosure suit against Branch and Maddux, so far as related to their

indebtedness, and so far as the doctrine of estoppel applies to such indebtedness, were the facts as they existed when the complaint was filed. In the Woolverton case it was held that the plaintiff had no new cause of action for rents accruing subsequent to the judgment, because in the former action it was determined that the defendants held the land freed from any conditions set forth in the plaintiff's complaint in the last action; in other words, the very issue presented in the last case was determined against Mrs. Woolverton in the former case.

In the present case the plaintiff alleged that defendant received money, which under its agreement should have been credited but was not, during every month after the action was commenced, up to the month in which the sheriff's sale occurred. How far he could have established his case by evidence we cannot know, for the trial court held him estopped to make any proof of his allegations. We think the court erred and that a new trial should be granted.

It is advised that the judgment and order be reversed.

Haynes, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed.

Henshaw, J., Temple, J., McFarland, J.

[Sac. No. 657. Department Two.—September 13, 1900.]

RICHARDS & KNOX, Respondents, v. W. H. BRADLEY,
Appellant.

RULING UPON DEMURRER—REVERSAL UPON APPEAL—RIGHTS OF PARTIES—LEAVE TO AMEND—ORDER FOR DISMISSAL WITHOUT PREJUDICE.—Upon the reversal of a judgment for an erroneous overruling of a demurrer to the complaint, the parties are restored to their original rights, and upon the sustaining of the demurrer with leave to amend, the plaintiff, instead of amending, may apply to the court for leave to dismiss the action without prejudice, and the court may order such dismissal.

1D.—POWER OF COURT—CONSTRUCTION OF CODE—PROVISION FOR CLERK'S DISMISSAL NOT MANDATORY OR EXCLUSIVE.—The provision for the dismissal of an action under subdivision 1 of section 581 of the Code of Civil Procedure by request of the plaintiff to the clerk is not mandatory or exclusive of the power of the court to grant an order of dismissal, which, when procured by the plaintiff, should be noted by the clerk in the register of actions.

APPEAL from an order of the Superior Court of Sacramento County for the dismissal of an action. Matt F. Johnson, Judge.

The facts are stated in the opinion of the court.

William Henley, and R. Platnauer, for Appellant.

L. T. Hatfield, for Respondents.

THE COURT.—This is an appeal from an order, made and entered on motion of plaintiff, dismissing the action. It appears from the bill of exceptions that the cause was here once before on appeal, and, the plaintiff confessing error in the overruling of defendant's demurrer, the "judgment was reversed and the cause remanded." The *remittitur* was, on motion of defendants, entered in the minutes of the trial court June 17, 1898, and the demurrer to plaintiff's complaint on that day came on to be heard, counsel for plaintiffs and defendants appearing, whereupon the following proceedings took place: "On motion of counsel for said defendant said demurrer was sustained by the court; plaintiff allowed five days in which to amend complaint; on motion of counsel for plaintiffs it is ordered that the above-entitled action be and the same is hereby dismissed at costs of plaintiff without prejudice; defendant allowed five days to file a bill of exceptions."

It is claimed that the court erred in allowing plaintiffs to amend their complaint. Plaintiffs did not avail themselves of the right to amend, but instead moved for a dismissal of the action. "After the reversal of the judgment the parties in the court below had the same rights which they originally had; and that court, therefore, had discretion to permit any proper amendment to the pleadings." (*Heidt v. Minor*, 113 Cal. 385.)

Whether or not plaintiffs' complaint stated a cause of action, and whether or not it would have been impossible for

them to do so by amendment, need not be considered, for defendants were not injured by the permission to amend, inasmuch as plaintiffs did not take advantage of it.

It is contended that the court had no power to dismiss the action, citing subdivisions 3, 4, 5, and 6 of section 581 of the Code of Civil Procedure, setting forth the contingencies upon which the court may dismiss an action. The point seems to be that these are the only subdivisions by which the court derives any power to dismiss a case, and that dismissals under subdivision 1 must be made only in the manner therein provided, to wit: "By the plaintiff himself, by written request to the clerk, filed among the papers in the case; . . . provided, a counterclaim has not been made or affirmative relief sought by the cross-complaint or answer of the defendant." In the case here there was no answer filed. Plaintiffs were not compelled to file a written request with the clerk. They had a right to move for a dismissal in open court and have its order made and entered. It is true the section provides that dismissals mentioned in subdivisions 1 and 2 "are made by entry in the clerk's register," and dismissals mentioned in the other subdivisions "shall be made by orders of the court entered upon the minutes thereof; . . . but the clerk of the court shall note such orders in his register of actions in the case." We do not think, however, that the mode pointed out in subdivision 1 is exclusive or mandatory. (See *Hinkel v. Donohue*, 90 Cal. 389; *Westbay v. Gray*, 116 Cal. 660.) It is often more convenient for the plaintiff to resort to that mode, but we see no objection to his making the motion to the court and taking the order which, when entered, should be noted by the clerk in the register of actions.

The order is affirmed.

[L. A. No. 858. Department Two.—September 13, 1900.]

SAN JOSE LAND AND WATER COMPANY, Appellant,
v. SAN JOSE RANCH COMPANY, Respondent.

PUBLIC LANDS—RAILROAD GRANTS—VOID PURCHASE.—The grant of lands to the Atlantic and Pacific Railroad Company had the effect to withdraw the land granted from other disposition, while that grant remained operative, both within the primary and indemnity limits, and the Southern Pacific Railroad Company acquired no right to any of said lands under its grant, and any purchase therefrom is void.

ID.—RESTORATION OF LANDS TO PUBLIC DOMAIN—CONFIRMATION OF WATER RIGHTS.—The restoration to the public domain by the act of Congress of 1886 of the lands granted to the Atlantic and Pacific Railroad Company by the act of Congress of 1866 operated to confirm existing water rights previously acquired by appropriation in 1870, without objection from that railroad company, and it seems that such confirmation made such water rights valid from their inception.

ID.—ACT TO RELIEVE PURCHASERS OF FORFEITED LANDS—PRE-EMPTION RIGHT—SUBORDINATION TO PREVIOUS WATER RIGHTS.—The pre-emption right conferred by section 5 of the act of Congress of March 3, 1887, to relieve *bona fide* purchasers of forfeited lands, upon purchasers to whom they have been improperly sold by any company as part of its grant, when not included therein, is subordinated to rights of way and ditch and water rights appearing to have been acquired in good faith under the laws of the United States prior to that act, and even prior to the inception of the grant under claim of which the improper sale was made.

ID.—ACTION TO QUIET TITLE—FINDINGS AGAINST PLAINTIFF'S TITLE—UNEXERCISED RIGHT OF PRE-EMPTION—OMISSIONS TO FIND AS TO DEFENDANT'S WATER RIGHT.—In an action to quiet title to land against an adverse claimant of a water right, where it appears that plaintiff had no other title or right than the pre-emption right conferred by the act of 1887, and that such right had not been exercised, and there had been no expression of an intent to exercise it, and that the plaintiff was not in possession of the land, and had never had more than a temporary possession of part thereof, the place and extent of which was not shown, a finding that plaintiff is not the owner of the land is sustained, and a judgment for the defendant for costs is supported, and it is immaterial that there is no finding or judgment as to the defendant's title to the water right where defendant does not appeal or complain of the judgment.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. **W. H. Clark**, Judge.

The facts are stated in the opinion.

Dunnigan & Dunnigan, and **Anderson & Anderson**, for Appellant.

J. S. Chapman, for Respondent.

CHIPMAN, C.—Action to quiet title to the east half of the northwest quarter of section 25, township 1 north, range 9 west, situated in Los Angeles county, and of which plaintiff claims to be the owner. Defendant denied plaintiff's ownership and denied that defendant claims any interest in the land except "the right to maintain in San Dimas creek (which flows over said land) a dam at a point about one hundred yards northerly from the center of said section 25, and to maintain pipes connecting with the said creek at the said dam for the purpose of conducting the waters of said creek to lands below the said section 25, for the purposes of irrigation and for domestic use," and denies that its said claim is without right. Defendant also pleaded section 313 of the Code of Civil Procedure, as a bar to the action. For a third defense defendant alleges that in 1868 one J. W. Hanes settled upon a tract of land at the mouth of San Dimas canyon, and near the center of said section 25, claiming the same for cultivation and grazing, and on September 23, 1870, he caused to be recorded in county recorder's office in said county a possessory claim under the act approved April 20, 1852, and acts amendatory thereof, setting forth in his affidavit claiming the land the requisite facts; that he at the same time claimed the waters of said creek for the purposes aforesaid, and had prior to said time entered upon said creek at a point about one hundred yards north of the north boundary line of the southeast quarter of said section, and about twenty feet west of the north and south line through the center of said section, and constructed a dam, and a ditch connected with said creek at a point immediately above said dam and extending down to and upon the land so claimed by him for the purpose of diverting the waters of said stream,

and by means thereof did divert the waters of said stream to and upon the land occupied by him and used the same for irrigation and domestic purposes; that the said ditch and the pipes subsequently laid along the course thereof have been continuously used by defendant and its grantors and predecessors from said time in 1870 to the commencement of this action for said purposes on said lands, and for like purposes on other lands in the vicinity of said southeast quarter of said section 25; that at the time of said appropriation and the location of said land said section 25 was unsurveyed public land, and defendant has succeeded by mesne conveyances to all the right and interest of said Hanes in said dam and ditches, pipes, rights of way, and easements upon said section 25, and it and its grantors and predecessors have, ever since 1870, been in the open, uninterrupted, and notorious and adverse use of said dam, ditches, and pipes, under a claim of right adversely to plaintiff and all the world, and defendant disclaims any other right to said east half of the northwest quarter of said section. The cause was tried by the court and defendant had judgment that plaintiff is not the owner of the land claimed by it, and that defendant recover its costs. There was evidence tending to establish the first and third defenses set up.

It appears from the findings and evidence that the land was within the indemnity limits of the grant to the Atlantic and Pacific Railroad Company under the act of July 26, 1866 (14 U. S. Stats., p. 292); that company failed to build its road and its grant was forfeited by act of Congress of July 6, 1886 (24 U. S. Stats., p. 123), and the land was restored to the public domain. The land in question was also within the ten mile limits of the grant of land to the Texas and Pacific Railroad Company by act of March 3, 1871 (16 U. S. Stats., p. 573); by the terms of that act the Southern Pacific Railroad Company was authorized to construct a line from Tehachapi Pass, by the way of Los Angeles, to the Texas and Pacific Railroad at or near the Colorado river, with the same rights as had been granted to the latter company; the Southern Pacific Railroad Company constructed its line to Yuma between 1874 and 1879, and pursuant to the act of 1871 selected the land in controversy; the land was unpatented and nonmineral; on February 28, 1887, the

latter company entered into a contract of sale and purchase of the northwest quarter of said section with W. D. Noland and Jacob Heckenlively for one hundred and sixty dollars; they paid thirty-two dollars as first payment of the principal and one year's interest in advance, and agreed to pay one hundred and twenty-eight dollars within five years and interest annually, which latter was paid to February, 1892, and no further payments of principal or interest were made; Noland and Heckenlively were citizens of the United States and purchased the land from the company in good faith; it was not then occupied by any *bona fide* claimant under the pre-emption or homestead laws, and had not been settled upon at the date of the purchase, or on March 3, 1887, or subsequent to December 1, 1882, under the settlement laws of the United States; neither Noland nor Heckenlively nor any of their assigns ever settled on the lands, cultivated or fenced any part thereof, but Heckenlively "did under said agreement of purchase, shortly after it was executed (which was February 28, 1887), enter upon said land and commence the construction of a ditch and tunnel thereon." There is no evidence in the record as to where Heckenlively entered upon the land for the purpose stated, how long he remained, or the extent of any work done by him in the construction of a ditch or tunnel, or the extent of his possession of the land. Noland on December 6, 1887, assigned his interest in the contract to Heckenlively; December 14, 1887, Heckenlively conveyed by grant deed to one Cushman the land in controversy, and on August 29, 1888, Cushman conveyed by grant deed to plaintiff the same land. The court finds that in and prior to the months of November and December, 1883, one N. W. Stowell owned, or claimed to own, a certain water right in the waters of said creek, "the character and extent of which water right the court does not now find or adjudicate," and that in said months Stowell laid and constructed across a portion of said land a twelve-inch pipe line to conduct water across said land to the southeast quarter of said section and to other lands; that prior to July, 1887, the defendant had by mesne conveyances "succeeded to and now owns the said water right owned or claimed by the said Stowell, and all the right and interest of

the said Stowell in and to said twelve-inch pipe line"; that defendant in July and August, 1887, did enter upon the land in controversy and "did build and construct thereon, at a point where the waters of said San Dimas creek flow thereon a stone, brick and cement forebay, sand-box or dam, and did lay and construct from said forebay or dam across a portion of said land a fourteen-inch pipe line"; the court finds that defendant claims right to maintain said forebay or dam and the said fourteen-inch pipe line, and also the twelve-inch pipe line laid by Stowell, but makes no other claim of right or title. The court does not find, nor does it decree, that defendant has such right; its conclusion of law is that plaintiff should take nothing by its action, and the decree was that plaintiff is not the owner of the land, and that defendant had judgment for its costs.

As the court has not found upon the issues presented by the affirmative allegations of the answer, but has disposed of the case entirely on the finding that plaintiff has no title to be quieted, we shall direct our attention to that issue.

Appellant contends that if any interest in this land passed to the purchasers under the contract of Noland and Heckenlively with the railroad company, then they or their vendees may protect that right by this action. The provisions of section 738 of the Code of Civil Procedure have been held to be broad enough to include an equitable title to real property (*Tuffree v. Polhemus*, 108 Cal. 670); and it may be that the right to purchase land under the act of 1887, presently to be noticed, may, under some circumstances, be quieted as against an unlawful trespass. The question is, Has plaintiff established a right under the allegation of ownership such as will entitle it to the relief asked? Plaintiff makes no claim under the Atlantic and Pacific Railroad Company's grant. Nor is the claim directly from the Texas and Pacific grant of March 3, 1871, of which the Southern Pacific Railroad Company availed itself by constructing its road. The court finds that this latter company made selection of this land under the act of 1871, but the court also found that the land is within the ten mile limits, which latter fact made the selection an unnecessary proceeding if the grant had otherwise been effected. The selection gave no additional right.

When the grant was made to the Atlantic and Pacific Railroad Company the effect was to withdraw the land granted from other disposition while that grant remained operative both within the primary and indemnity limits, and the Southern Pacific Railroad Company took nothing by its grant, and could convey nothing to Noland and Heckenlively. (*United States v. Southern Pac. R. R. Co.*, 146 U. S. 570; *United States v. Colton etc. Co.*, 146 U. S. 615; *Southern Pac. R. R. Co. v. United States*, 168 U. S. 1; *Southern Pac. R. R. Co. v. Painter*, 113 Cal. 247.) Whether defendant's predecessors could acquire any rights of way or other easements, or appropriate the waters of San Dismas Creek, after the grant to the Atlantic and Pacific Company, if that company had finally perfected its right to a title and had objected to such appropriation, need not be decided. While the land was withdrawn from entry under its grant it did not object to defendant's appropriation, and before any rights were acquired by plaintiff's predecessors the land was restored to the public domain, and whatever rights defendant's predecessors had acquired by appropriation of water or rights to make ditches and lay pipe lines attached at once upon the forfeiture of the grant of the Atlantic and Pacific Company by the act of 1886 and the restoration of the land to the public domain. If the land had not been granted to the Atlantic and Pacific Company the rights of the appropriators would have attached to the land under the act of July 26, 1866, and amendatory acts, granting the right to construct ditches, etc., and we see no reason why, upon the failure of the grant and the resumption of full title by the government, that defendant's rights did not become valid from their inception. It results that whatever rights defendant acquired were undisturbed by the grant to any of these roads, and but for the act of Congress, next to be noticed, these rights of defendant are indisputable. On March 3, 1887, Congress passed an act entitled "An act to provide for the readjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes." (24 U. S. Stats., p. 556.) The main purpose of this act was to relieve purchasers of forfeited lands. Section 2 provided for canceling patents erroneously issued to any company. Section 3 related to *bona fide* settlers under the pre-emption or

homestead laws and reinstated them in their rights of their application was renewed within a reasonable time. Section 4 gave the right to a purchaser in good faith from the railroad company to a patent from the government, upon making proof of such purchase within such time as might be prescribed by the secretary of the interior. The case before us does not come within the provisions of any of these sections.

Appellant claims under section 5, which reads as follows: "That where any company shall have sold to citizens of the United States . . . as parts of its grant, lands not conveyed to or for the use of such company, . . . and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns." Provisos in the section except therefrom lands "in the *bona fide* occupation of adverse claimants under the pre-emption or homestead laws," etc., and also "lands settled upon subsequent to the first day of December, 1882, by persons claiming to enter the same under the settlement laws of the United States," etc. (24 U. S. Stats., p. 556.)

It will be observed that this right to purchase was subordinated to the rights of claimants under the pre-emption and homestead laws and the settlement laws of the United States, from which it would seem evident that the lands were previously treated as public lands open to settlement. A purchaser from a railroad company prior to the act would gain no advantage by his purchase as against the excepted classes. And we think the right of any such purchaser, who based his right solely on his contract of purchase, would be subordinate to rights of way, ditch and water rights previously acquired in good faith under the laws of the United States. It may be that if the purchaser from the railroad company was in actual possession of the land when the relief act of 1887 was passed, and had made or was making valuable improvements thereon in good faith, believing that he had title from the company, and he showed that he had applied to purchase or that he intended within a reasonable time to make

application to purchase under said act, the courts would protect his right as against a right acquired by another person subsequent to such possession and declared intention. But as between a right, such as is claimed by defendant, acquired prior to the act of 1887 and prior indeed to the act of 1871, and as early as in 1870, and the right by which plaintiff claims, the former must prevail.

In the case before us there is no evidence that plaintiff or its predecessors are now or ever were in possession of the land; there is a finding that Heckenlively, shortly after he entered into the contract with the Southern Pacific Railroad Company, "did enter upon said land and commence the construction of a ditch and tunnel thereon," but there is no evidence as to what part of the land this was or as to the extent of this temporary possession, or how long he remained or what work he did; there is no evidence that plaintiff or any of its predecessors ever applied to purchase the land, or expressed an intention to do so, or that plaintiff now desires to purchase or intends to purchase the land. Its right to purchase accrued, if at all, in 1887. It seems to me, conceding that it has not lost this right by its delay to make application to purchase that a court of equity ought not to grant the relief asked upon a mere right to purchase, such as is shown in this case, where it appears that plaintiff and no person under whom it claims was ever in possession of the land; is not now in possession; has never applied to purchase the land, and does not show any intention to purchase it. We think there should be some more tangible right shown than appears here before a court of equity will lend its aid to quiet plaintiff's right, which appears to be nothing more than an option to purchase unaccompanied by any equitable circumstances.

Respondent complains that the court made no findings on the facts alleged in defense—in other words, that it did not find as to defendant's title. The complaint alleged ownership in plaintiff; the evidence was clearly insufficient to establish ownership; the findings of fact give all the evidence upon which the claim of plaintiff rests, and the court, as a conclusion of law, found "that the defendant is entitled to judgment that plaintiff take nothing by its suit," and the decree adjudged "that plaintiff is not the owner" of the land in

controversy. Defendant does not appeal nor complain that its title was not adjudicated. We think the findings cover all the facts on which plaintiff relied to show that it is the owner of the land; and as the facts do not support any claim of ownership, legal or equitable, but do support the conclusion reached by the court, we see no error in omitting to find as to defendant's title or defenses.

The complaint was filed in 1889 and came on for trial in 1890. The findings were lost and the judgment was not filed and entered until March 12, 1897. Findings were substituted by stipulation June 29, 1899, and the appeal perfected thereafter in due time. No explanation is given for the delay in having judgment entered and the findings supplied at an earlier date, but no point is made by either party by reason of these facts.

There are numerous other interesting questions discussed in the briefs, but we think the foregoing disposes of all that are necessary to the decision.

It is advised that the judgment and order be affirmed.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

McFarland, J., Temple, J., Henshaw, J.

Hearing in Bank denied.

[Sac. No. 743. Department Two.—September 13, 1900.]

J. ELLIS RODLEY and J. F. BARNES, Respondents, v.
GEORGE LYONS, Appellant.

ATTACHMENT—DISSOLUTION—BILL OF SALE AS SECURITY FOR NOTE—
WANT OF DELIVERY.—In an action upon a note, in which an attachment was issued and a motion was made to dissolve it on the ground that it was secured by a bill of sale of a stock of merchandise, evidence that the bill of sale was never delivered to nor accepted by the plaintiffs nor by anyone authorized to receive it, and that there was no delivery of possession of the merchandise, is sufficient to prove that the bill of sale never operated as se-

curity for the note, and to sustain an order refusing to dissolve the attachment.

ID.—SETTING CAUSE FOR TRIAL—SUFFICIENCY OF NOTICE—DEFENDANT NOT PREJUDICED.—Where it was admitted upon the motion to discharge the attachment that the only defense to the action would be that the security given for the note should be first exhausted by foreclosure, and that if the attachment was dissolved judgment might be entered for plaintiff to save costs of another suit, the question of security being all that was involved, the defendant cannot be prejudiced by an order setting the case for trial within two days after settling the question of security against the defendant, instead of giving five days' notice of the trial.

ID.—NONAPPEARANCE OF DEFENDANT AT TRIAL—OBJECTION TO NOTICE—RECITAL IN JUDGMENT—CONSENT OF COUNSEL—CONCLUSIVE FINDING.—Where the judgment recited that counsel for both parties agreed in open court on the hearing of the motion to dissolve the attachment that the cause should be peremptorily set for trial upon the decision of the motion, and was so set for two days thereafter at the time when the motion was denied, such recital is proper and necessary, in view of the nonappearance of the defendant at the trial, on account of objection to insufficiency of the notice of trial, and the findings so made in the judgment is conclusive.

APPEAL from a judgment of the Superior Court of Butte County and from orders refusing to dissolve an attachment and denying a new trial. John C. Gray, Judge.

The facts are stated in the opinion.

Richard White, for Appellant.

Guy R. Kennedy, and Jo D. Sproul, for Respondents.

HAYNES, C.—Plaintiffs brought this action in the superior court upon a promissory note executed to them by the defendant, and caused a writ of attachment to be issued and levied upon certain personal property of the defendant. A motion to dissolve the attachment was made by the defendant, and was denied by the court on June 24, 1899, on which day an order was made setting the cause for trial on June 26th and on the day last named, in the absence of defendant, a trial was had and the plaintiffs obtained judgment. A motion for a new trial was made and denied, and defendant appeals: 1. From the order refusing to dissolve the attachment; 2. From the order setting the case for trial; 3. From

an order denying the motion for a new trial; and 4. From the judgment.

The defendant in said action was engaged in the business of a harness maker and selling harnesses, saddles, whips, etc., in Chico, and his stock was supposed to be of the value of about one thousand dollars. On the evening of March 24, 1899, his goods were attached by a creditor, the amount due, including costs and sheriff's fees, being four hundred and twenty-seven dollars. Defendant, desiring to pay the demand and have his property released, applied to the plaintiffs for a loan of said amount, and offered to execute a bill of sale upon his said property to secure them. They thereupon went to an attorney's office to have the papers prepared. A promissory note for said sum, due one day after date, payable to the plaintiffs, and a bill of sale of the stock of goods, were prepared, and signed by the defendant, and plaintiffs each drew a check for one-half of said sum. The checks were delivered to the sheriff, who thereupon released the attachment.

On April 17th another creditor of defendant Lyons levied an attachment upon the same stock of goods upon a demand for the sum of one hundred and fifty dollars, and thereupon plaintiffs brought this action and procured an attachment to issue and to be levied on the same goods, subject to the prior attachment. Plaintiffs' affidavit upon which the writ of attachment was based stated, after setting out the indebtedness, "that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property." This statement defendant contends was not true; that the plaintiffs had security by a pledge of the personal property effected by the bill of sale and possession taken thereunder.

In the brief statement we have made of the transaction at the attorney's office it will be observed that it is only said that the bill of sale was signed by the defendant. That was about as much as could be stated of what then occurred without entering the domain of disputed facts. The affidavits used on the hearing cover eighty-three pages of the transcript, and as to all material facts averred by either side, except those above stated, are either explained away by the other side or met by a flat contradiction, and a decision by

the court below either way would necessarily be affirmed here, whatever might be our opinion as to the weight of the evidence or the credibility of the witnesses. It is sufficient to say that there was evidence that Kennedy, the attorney who drew up the papers, was asked by plaintiffs whether a bill of sale would be security, and that he replied that it was no security unless they took and held possession of the goods: that Rodley stated that the security was no good, and started to leave the office; that defendant said that he owed little, that forty dollars would cover all his other indebtedness, and Rodley then consented to make the loan; that the plaintiffs did not read or examine the bill of sale, that it was not delivered to them, that it was lying on the table and defendant told Kennedy to put it in his drawer. There was also evidence to the effect that plaintiffs requested Kennedy to put the note in the bank, and that Lyons, the defendant, was told to make payments to the bank as he could spare the money, and that it was expected that he could close the matter up by the next October. Barnes, one of the plaintiffs, testified that he never saw a bill of sale signed by Lyons; that if it was signed it was never delivered to either of the plaintiffs, nor to any agent of theirs, and no one was authorized to receive it. It is quite clear that if the bill of sale was never delivered or accepted it never operated as any security to plaintiffs. It might well be that relying on defendant's statement that all his other debts did not exceed forty dollars, that they did not desire to interfere with his business by taking possession, and so did not accept the bill of sale, and the direction that the note be placed in the bank, where the defendant could make payments upon it as he could spare the money, implied that he was to remain in possession and continue his business as before, a fact inconsistent with the advice of the attorney and of their probable action if they had accepted the bill of sale. I think, therefore, that there was evidence sufficient to sustain the action of the court in refusing to dissolve the attachment, and that his order in that behalf should be affirmed.

2. The order denying the motion to dissolve the attachment was made on June 24th, and on that day, in the absence of the defendant and without his consent, the cause was set down to be tried on the 26th. Notice thereof was served upon

defendant the same day, and defendant admitted service "with all rights reserved, and without waiving right to object to insufficient notice of setting the case for trial."

By an act approved February 14, 1899 (Stats. 1899, p. 5), section 594 of the Code of Civil Procedure was amended by adding thereto the following: "Provided, however, if the issue to be tried is an issue of fact, proof must be first made to the satisfaction of the court that the adverse party has had five days' notice of the trial."

In the notice of appeal it was stated that said order setting the case for trial was appealed from, apparently as an independent appeal, but it is included in the notice of motion for a new trial as one of the grounds of said motion, and, indeed, is the only ground appearing in the record upon which a new trial was sought, and will be so considered.

The judgment recites that the motion to dissolve the attachment was heard on June 20th; that counsel for both parties agreed that day, in open court, that the cause should be peremptorily set for trial upon the decision of the motion to dissolve the attachment, and was so set at the time the motion was denied.

Defendant's attorney, in his affidavit filed on his motion for a new trial, states that on June 20th, at the time of the hearing of the motion to dissolve the attachment, the court suggested that counsel consent to a trial at that time, so that the whole matter could be heard together; that he objected to a summary hearing, or having the cause set for the next day, and in reply to plaintiffs' counsel stated that he was willing to admit that the note had been executed as alleged, but that it was secured, and the action brought was not the proper action, but that the security should first be exhausted by foreclosure; and in the affidavit of defendant as to what his counsel said he used this language: "That if his motion for the dissolution of the attachment was so decided (in his favor) he would consent to a judgment being entered for plaintiffs, as the question of security was all that was involved, and when that was settled defendant would have no other defense to the note, and a judgment might then be entered to save costs of another suit."

The question whether plaintiffs at any time held security for the payment of the note having been settled by the decision upon the motion, it is quite clear from the above statement that the defendant was not injured by a trial of the case upon two days' notice instead of five. But the recital in the judgment, as we have seen, conflicts with counsel's statement, and this recital was proper and necessary in view of the nonappearance of the defendant at the trial; and this finding is conclusive. The order setting the cause for trial being the only ground of the motion for new trial, the order denying that motion should be affirmed. No other errors are suggested or urged, and we find none affecting the judgment.

It is therefore advised that the judgment and orders appealed from be affirmed.

Gray, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and orders appealed from are affirmed.

McFarland, J., Temple, J., Henshaw, J.

[S. F. No. 1449. Department Two.—September 13, 1900.]

PIETRO QUEIROLO, Respondent, v. ROSA QUEIROLO,
Appellant.

DIVORCE—CUSTODY OF CHILDREN—PETITION FOR MODIFICATION OF DECREE—REFUSAL OF CONTINUANCE—ABSENCE OF SHOWING.—Upon the hearing of a verified petition to modify a decree of divorce which awarded the custody of the children to the mother, so as to award the same to the father, on the ground of the mother's alleged unfitness and immoral conduct, an application by her counsel for a continuance based merely on the certificate of a physician as to her illness, without any denial of the averments of the petition, or any affidavit or professional statement that she would testify contrary to its averments, or that her presence at the hearing was necessary, was properly refused.

ID.—SUPPORT OF MODIFICATION—EVIDENCE OF IMMORAL CONDUCT.—Testimony in support of the allegations of the petition by witnesses who were in a position to know the character of the house in

which the defendant was residing with the children that it was notoriously disreputable, and that she was illicitly cohabiting therein with another man, and that the place and its surroundings were unfit for the children, sufficiently warrants the court in modifying the decree by taking the children from the custody of the mother and awarding them to the custody of the father.

10.—ADMISSION OF COUNSEL IN OPEN COURT—REVIEW UPON APPEAL—ABSENCE OF RULING AND EXCEPTION—APPELLANT NOT INJURED.—The admission of the counsel for the defendant in open court as to the immoral conduct of the defendant, even if it be conceded in excess of the authority given him by section 283 of the Code of Civil Procedure, cannot be made a ground of reversal upon appeal of the defendant, where it appears that no ruling was made by the court, and objection was made or exception taken, in respect to the consideration of the admission by the court, and where the evidence was such as clearly to show that the defendant was not injured by the admission, if it be conceded to be error.

APPEAL from an order of the Superior Court of the City and County of San Francisco modifying a decree of divorce as to the custody of the children. J. M. Seawell, Judge.

The facts are stated in the opinion.

F. D. Brandon, James A. Devoto, and Devoto & Demartini, for Appellant.

Leon Samuels, for Respondent.

CHIPMAN, C.—This is an appeal by defendant from an order modifying a decree, given and made November 18, 1896, by which plaintiff obtained a divorce from defendant on the ground of her extreme cruelty, and awarding the custody of their three minor children to defendant.

On November 22, 1897, plaintiff filed a verified petition in the action, setting forth, among other facts, that defendant is residing with said three children at No. 321 Pacific street; that the children are of tender years, to wit, one a boy aged nine years, one a girl aged seven years, and one a girl aged five years; "that said house is a notoriously disreputable house and an unfit and improper place in which to rear said children; that said defendant has neglected and improperly treated said children and each of them"; that "for a long time past said defendant has notoriously and illicitly cohabi-

ted and now cohabits with one A. Donzelli, though not united to him in the bonds of matrimony. . . . and that the said defendant is not a fit or proper person to have care, control, custody, and education of said children." The petition concludes with a prayer that the decree be modified so far as relates to said children, etc.

The petition was ordered to be heard on November 23, 1897, of which defendant had due notice, and came on to be heard on November 30th, plaintiff appearing in person and by counsel, and defendant appearing by counsel, Mr. F. D. Brandon. A continuance was asked by defendant's counsel on the certificate of her attending physician that defendant was "too sick and ill to be personally present in court." By consent of the parties the testimony of several witnesses was taken and the further hearing was postponed until December 3, 1897, at which time defendant's counsel again moved for a continuance on the same ground as before, and the court denied the motion. Counsel for defendant thereupon orally denied the allegations of the petition except as to the alleged illicit cohabitation of defendant with the said Donzelli, which he admitted to be true. The matter was submitted to the court for its decision, and on December 8, 1897, the court made its order modifying its decree in the divorce case and awarded the custody of the children to plaintiff. The order recites, among other things, that "all the allegations set forth in plaintiff's petition were proven to the satisfaction of the court."

Error is claimed: 1. In refusing to grant defendant's motion for a continuance; 2. For insufficiency of the evidence to support the order; and 3. In considering the admission of the counsel for defendant at the time it was made.

The first objection is grounded on the assumption that the certificate of the physician alone gave defendant an absolute right to a continuance. There was then no answer to the petition, no denial of its verified averments, no affidavit of defendant nor even an oral statement of her counsel that if permitted to be present defendant would testify to the untruthfulness of the facts stated in the petition or to any facts whatever, and no showing that her presence was necessary as a witness or as adviser to her counsel in conducting

the hearing. Under such circumstances it was not error to refuse the motion. (*Paulucci v. Verity*, 1 Kan. App. 121.)

The evidence was sufficient to support the order. It appeared by the testimony of witnesses who were in position to know the character of the house in which defendant was residing with her children that it was notoriously of the character alleged, and that its immediate surroundings were such as to warrant the court in causing the removal of the children and in determining that they should be taken from defendant and given to plaintiff's custody and care.

Counsel strenuously contend that it was error to receive and consider the admission of counsel as to the immoral conduct of his client; that the admission was in excess of the authority given him by section 283 of the Code of Civil Procedure, and several pages of the reply in brief are devoted to an argument the purpose of which is to show that the decision in *Hearne v. De Young*, 111 Cal. 377, "is highly technical and not warranted in reason or principle." Other cases giving construction to this section are *Preston v. Hill*, 50 Cal. 53,¹ and *Smith v. Whittier*, 95 Cal. 279, and these cases were referred to approvingly in *Reclamation Dist. v. Hamilton*, 112 Cal. 603. We do not feel called upon to discuss the point in the present matter. The admission was made in open court at the hearing by the then attorney of defendant, who now, with associate counsel, seeks to take advantage of it by this appeal. Some testimony was given tending to show the truth of the fact admitted; no objection was made to the admission, and, of course, no ruling made or exception reserved thereto. Besides, the testimony was such as to clearly show that defendant was not injured by this admission of her counsel if it be conceded to be error.

The order should be affirmed.

Gray, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the order is affirmed. Harrison, J., Temple, J., Henshaw, J.

¹ 19 Am. Rep. 647.

[L. A. No. 679. Department Two.—September 13, 1900.]

JENNIE OBERLANDER, Appellant, v. FIXEN & CO., Respondent.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—EXTENSION OF TIME TO FILE AFFIDAVITS.—Under section 659, subdivision 1, of the Code of Civil Procedure, the court has power to extend the time for filing affidavits on motion for a new trial to more than thirty days beyond the statutory time. The limitation on the court's power of extending time in other classes of cases imposed by section 1054 of that code has no application to such a case.

ID.—CUMULATIVE EVIDENCE—APPEAL.—Under section 657 of the Code of Civil Procedure, a new trial asked for on the ground of newly discovered evidence should not be refused merely because the evidence is cumulative in a case where the cumulation is sufficiently strong to render a different result probable. Whether the evidence is or is not of this character is not a question of law, but is for the judgment of the trial judge, whose discretion will not be interfered with on appeal, except in cases of manifest abuse. This rule obtains on appeal, whether the motion for a new trial is granted or denied by the trial court.

ID.—DILIGENCE IN DISCOVERY.—The question whether the newly discovered evidence could with reasonable diligence have been discovered and produced at the trial is for the trial judge, and his determination will be regarded as conclusive on appeal unless it appears that his discretion has been abused.

APPEAL from an order of the Superior Court of Los Angeles County granting a new trial. Lucien Shaw, Judge.

The facts are stated in the opinion of the court.

William J. Hunsaker, and Paul R. Frost, for Appellant.

I. H. Johnson, and John T. Jones, for Respondent.

THE COURT.—The appellant recovered judgment in the court below for damages (seventeen hundred and fifty dollars), resulting from her falling down a negligently constructed staircase leading from the defendant's storeroom, where she had just been employed by the defendant, to the basement. The court granted a new trial on the ground of newly discovered evidence; and the grounds urged for reversal are: 1. That the affidavits were not served or filed

in time; 2. Want of diligence on the part of defendant in preparation for trial; and 3. That the newly discovered evidence was merely cumulative.

The first point presents no difficulty. The time allowed the defendant for filing affidavits was extended by order of court, and the affidavits were in fact filed more than thirty days beyond the statutory time; but an extension beyond thirty days is forbidden by the section 1054 of the Code of Civil Procedure only with reference to the cases therein enumerated; among which the filing of affidavits on motion for new trial is not included, with reference to which the power of the court to extend is given by section 659, subdivision 1. The case of *Smith v. Jordan*, 122 Cal. 68, cited by appellant's counsel, bears no analogy to the case at bar; and the rule therein referred to—established in *Flagg v. Puterbaugh*, 98 Cal. 134—has no application.

The other points may be conveniently considered together. Under the provisions of section 657 of the Code of Civil Procedure the requisites for a new trial on the ground of newly discovered evidence are that the evidence could not, with reasonable diligence, have been discovered and produced at the trial, and that it shall be "material for the party making the application" (subdivision 4)—or, as previously expressed, shall be of a character "materially affecting the substantial rights of such party." The last requisite would seem to imply that the newly discovered evidence should be of such a character as to render a different result probable on a new trial; and accordingly such is held by the court to be the established rule. (Hayne on New Trial and Appeal, 91.) Where these requisites occur they constitute sufficient grounds for new trial, and no others can be required.

Hence the rule, so often reiterated by the courts, that a new trial should not be granted where the evidence is merely cumulative, must be regarded (in this state) not as an independent rule, additional to those established by the provisions of section 657 of the code, but as a mere application of those rules, or, as it has been expressed, as "a corollary of the requirement that the newly discovered evidence must be such as to render a different result probable on a retrial of the case." (Hayne on New Trial and Appeal, sec. 90, pp. 255,

256.) For (continuing the citation) "it is evident that new evidence, although cumulative, might be of so overwhelming a character as to render a different result certain" (or probable); and in such case under the express provisions of the code a new trial should be granted. The rule should therefore be construed as simply holding that cumulative evidence is insufficient "unless it is clear such evidence would change the result." (*Levitsky v. Johnson*, 35 Cal. 41.) Hence, "a new trial should not be refused merely because the evidence is cumulative in a case where the cumulation is sufficiently strong to render a different result probable." That this is the true statement of the rule is established in the case last cited, and in *Von Glahn v. Brennan*, 81 Cal. 264, and in *O'Rourke v. Vennekohl*, 104 Cal. 256—from which the above language is quoted; and it is so in effect held in *People v. Stanford*, 64 Cal. 27.

Whether the evidence is of this character is not a question of law but for the judgment of the trial judge, whose discretion will not be interfered with by this court except in cases of manifest abuse. Hence, where the motion is denied, the fact that the newly discovered evidence is merely cumulative will in general be a sufficient ground for affirmance; but where the motion is granted, the contrary will hold. For, in either case, it is for the trial judge to determine whether the evidence is of character probably to affect the result on a new trial; and unless the evidence be of such a character as to make it manifest and certain to this court that in the one case it would, or in the other that it would not, result differently on a retrial, the order will not be disturbed. The present case, we think, comes within the principles above laid down, and it will, therefore, in the view we take of the case, be unnecessary to determine whether the newly discovered evidence was in fact cumulative or otherwise.

Whether in this case the evidence could with reasonable diligence have been discovered and produced at the trial was also a question upon which the judgment of the court below must be regarded as conclusive, unless it appear that his discretion has been abused; and on this point we think the moving party made a sufficient case. (*Jones v. Singleton*, 45 Cal. 92.)

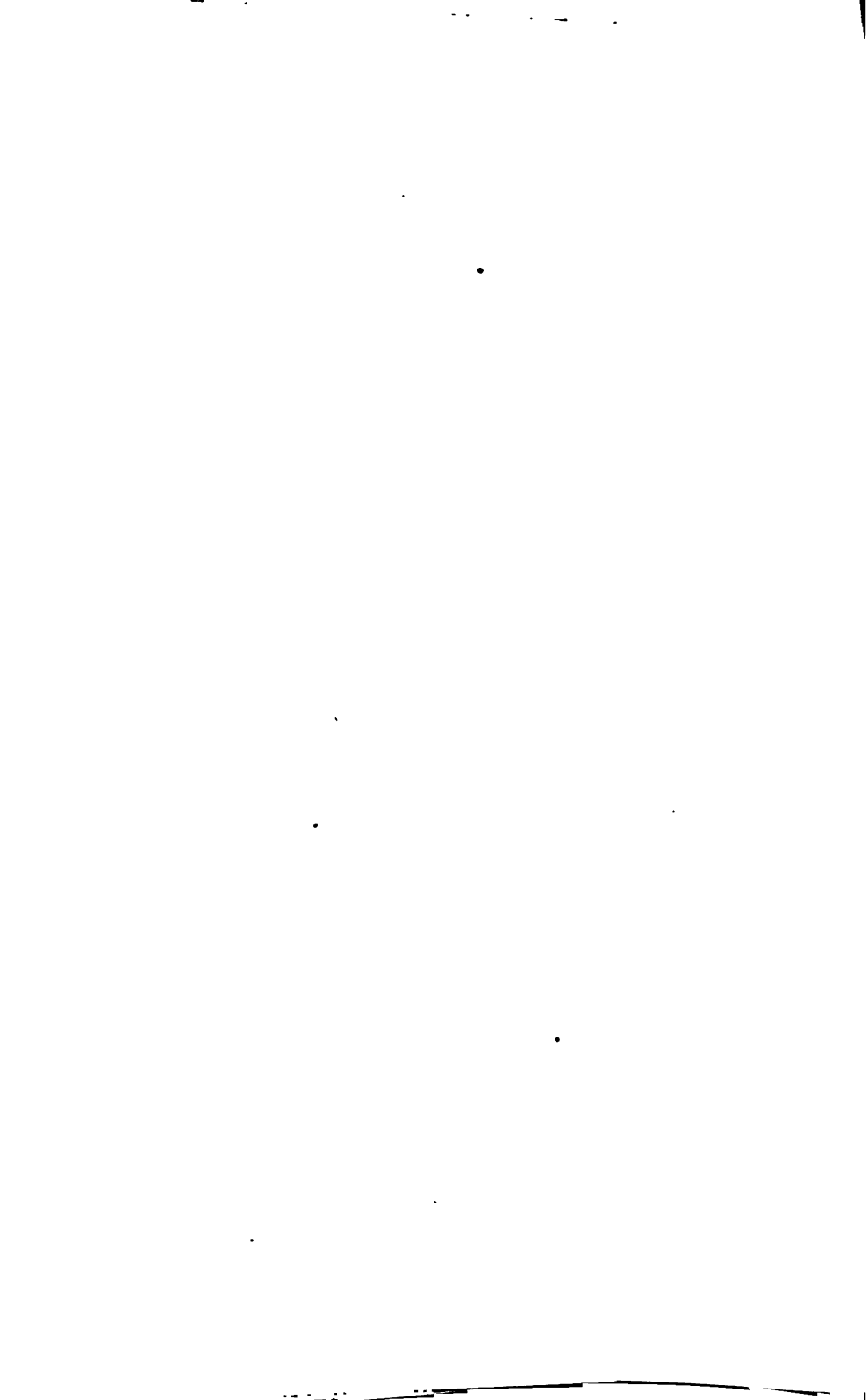
Counsel for appellant, on the construction they put on the affidavit of A. H. Fixen, make a very strong case, and could we agree in that construction our conclusion might be different; but our view of the terms of the affidavit is different. It reads: "I am the treasurer of the defendant corporation and as such had particular charge of arranging defendant's defense to this action subsequent to the trial of said cause, to wit, on or about the first day of June, 1896, and for some time thereafter, I have discovered evidence," etc. This is construed by the counsel as saying that affiant had charge of the defense "subsequent to the trial" only. But, obviously, this construction cannot be entertained, and we must construe the affidavit as though "subsequent" were written with a capital initial, and a period inserted after "action." (Bouvier's Law Dictionary, word "Punctuation.") Thus construed, the affidavit clearly states that the affiant had charge of the defense and shows that he used reasonable diligence in preparing for it. Nor does it appear that the newly discovered evidence was of a character "to put defendant upon inquiry." (*Heintz v. Cooper*, 104 Cal. 671.)

The order granting a new trial must therefore be affirmed, and it is so ordered.

Hearing in Bank denied.

INDEX.

(695.)



INDEX.

ABATEMENT. See Appeal, 13; Estates of Deceased Persons, 18.

ACCOUNT STATED. See Attachment, 4-6.

ADVERSE POSSESSION. See Water and Water Rights, 4-6, 10-13.

AGENCY.

KNOWLEDGE OF AGENT, WHEN NOT AFFECTING PRINCIPAL.—The knowledge of an agent is not knowledge of the principal in respect of matters not within the scope of the agent's authority. (*Westerfield v. New York Life Ins. Co.*, 68.)

See Fraud, 9; Sale, 20.

APPEAL.

1. **REVIEW OF EVIDENCE—EXCLUDED EVIDENCE.**—This court, in reviewing upon appeal the sufficiency of the evidence to sustain the findings of the court, cannot consider any excluded evidence. (*Shepherd v. Turner*, 530.)
2. **ARGUMENT—SPECIFICATIONS OMITTED FROM BRIEF—ABANDONMENT.** Specifications of the insufficiency of the evidence to support the findings, which are not argued in the appellant's brief, will be deemed abandoned. (*Id.*)
3. **REVIEW UPON APPEAL—INSUFFICIENCY OF EVIDENCE.**—Where an appeal from the judgment is taken more than sixty days after the entry of the judgment, the question whether the evidence is insufficient to support the judgment cannot be considered upon such appeal; and where the ground of insufficiency of the evidence was not urged or considered on the hearing of the motion for a new trial, the review upon appeal from the order denying the new trial will be confined to the errors urged and considered by the court below. (*Coonan v. Loewenthal*, 197.)
4. **FINDINGS—SUFFICIENCY OF EVIDENCE—NEW TRIAL—JUDGMENT.**—Upon appeals from a judgment and from an order denying a motion for a new trial, neither of which is taken within sixty days after the denial of the motion, the appeal from the order will be dismissed, and the question of the sufficiency of the evidence to justify the findings and decision cannot be considered. (*Wise v. Ballou*, 45.)

APPEAL (Continued).

5. **ORDER DENYING NEW TRIAL—INSUFFICIENCY OF FINDINGS.**—Upon an appeal from an order denying a new trial, an objection to the sufficiency of the findings cannot be urged as a ground for reversal, and can only be considered as advisory in relation to further proceedings in the cause, upon reversal of the order. (*Fogarty v. Fogarty*, 46.)
6. **JUDGMENT—LAPSE OF TIME.**—An appeal from a judgment taken nearly two years after the rendition and entry of the judgment cannot be entertained. (*Houser & Haines Mfg. Co. v. Hargrove*, 90.)
7. **NEW TRIAL ORDER—PROCEEDING INDEPENDENT OF JUDGMENT.**—A motion for a new trial under the code is a proceeding independent of the judgment, and may be granted even after the judgment has been affirmed upon appeal; and an order granting or denying a new trial may be reviewed upon an appeal taken in time, notwithstanding the judgment may be final. (*Id.*)
8. **APPEAL FROM JUDGMENT—ABSENCE OF EVIDENCE—FINDINGS—OMISSION.**—Upon an appeal from the judgment taken upon the judgment-roll alone, without any bill of exceptions, or showing of what evidence was given, the findings made are conclusive; and the omission to make findings upon issues presented by a cross-complaint is not ground for a reversal of the judgment. (*Stewart v. Hollingsworth*, 177.)
9. **REFUSAL TO STRIKE OUT IRRELEVANT MATTER—IDENTIFICATION IN RECORD.**—In the record upon appeal from an order refusing a motion to strike out certain parts of a complaint as redundant, unnecessary, and irrelevant which are referred to in the motion by page and line of the pleading, the transcript should identify the matter to which the motion was addressed. (*Higgins v. San Diego Sav. Bank*, 184.)
10. **HARMLESS ERROR.**—Where the record shows that the cause was tried upon its merits, and that no substantial right could have been affected by the ruling of the court in refusing to strike out immaterial matter which should have been stricken out as irrelevant, the error will be deemed harmless, and in such case the judgment will not be reversed. (*Id.*)
11. **PREMATURE ACTION.—APPEAL FROM JUDGMENT—MOTION TO DISMISS—MERITS AND PURPOSE OF APPEAL NOT CONSIDERED.**—The defendants in a premature action who have prevailed in a defense thereto have a right to appeal from a judgment of dismissal thereof which is declared to be not a bar to another action, which declaration was not in accordance with the prayer of their answer and is in form a judgment against them. Upon a motion to dismiss such appeal upon the ground that the appellants are not aggrieved, and that the appeal is frivolous and taken for delay, the merits of the appeal, as respects the prejudicial character of the judgment or the frivolous character of the appeal and the purpose of delay, cannot be considered. (*Nevills v. Shortridge*, 575.)

APPEAL (Continued).

12. **REMEDY FOR FRIVOLOUS APPEAL.**—An appeal cannot be dismissed upon the ground that it is frivolous or taken merely for delay. The remedy therefor must be sought in such addition to the judgment as may be just under section 957 of the Code of Civil Procedure. (Id.)
13. **SECOND ACTION—PLEA IN ABATEMENT.**—The fact that a second action has been brought for the same cause, and that the defendants have pleaded in abatement thereof the pendency of the former action by virtue of their appeal, is not a sufficient reason for dismissal of the appeal, even if such plea is well taken. Whether the appeal is sufficient to establish such plea must be determined in the second action. (Id.)
14. **ONE UNDERTAKING UPON DISTINCT APPEALS—DISMISSAL—WAIVER OF RIGHT—STIPULATIONS.**—Notwithstanding one undertaking upon two distinct appeals is so defective as to justify dismissal of both of them, yet the right to move to dismiss the appeal from the judgment will be deemed waived where the parties have mutually stipulated for extensions of time for the filing of points and authorities, and no objection was raised to the regularity or sufficiency of the appeal until after the points and authorities were filed, and until it was too late to take another appeal. But such waiver does not apply to a distinct appeal from an order made after judgment, the time of appeal from which had elapsed before any stipulations were made; and such appeal must be dismissed for want of a distinct undertaking thereupon. (*Gardiner v. California Guarantee Invest. Co.*, 528.)
15. **DISMISSAL—DEFECTIVE UNDERTAKING—"INSUFFICIENCY"—NEW UNDERTAKING.**—Where an undertaking on appeal is so defective as to amount to the entire absence of an undertaking, the appeal must be dismissed; but where the undertaking is not so defective, but is merely "insufficient" within the meaning of section 954 of the Code of Civil Procedure, a new undertaking sufficient in form, and approved by a justice of this court will be allowed to be filed herein before the hearing of a motion to dismiss the appeal, in which case the appeal cannot be dismissed. (*Jarman v. Rea*, 157.)
16. **FAILURE OF UNDERTAKING TO PROVIDE FOR DISMISSAL.**—An undertaking on appeal which provides that appellant will pay all damages and costs which may be awarded against them on the appeal, but which omits the clause "or on a dismissal thereof," is not a totally defective undertaking, which absolutely requires the dismissal of the appeal, but is objectionable only for "insufficiency," which may be remedied by the filing of a new undertaking in this court. (Id.)
17. **WANT OF SPECIFICATIONS IN TRANSCRIPT.**—The objection that the transcript does not contain any specifications of the errors of law, or the particulars in which the evidence is insufficient, is not ground for a motion to dismiss the appeal, and cannot be considered upon such a motion. (Id.)

APPEAL (Continued).

18. **DISMISSAL—SERVICE OF NOTICE—INSUFFICIENT AFFIDAVIT.**—An affidavit of service of the notice of appeal must show a strict compliance with the provisions of the statute; otherwise it is insufficient to establish the fact of service; and, in the absence of sufficient proof of the fact of service of the notice, the appeal must be dismissed. (Linforth v. White, 188.)
19. **INSUFFICIENT PROOF OF SERVICE BY MAIL—RESIDENCE OF ATTORNEYS.**—An affidavit of service by mail of the notice of appeal must show that the attorneys for the appellant whose duty it is to make the service, and the attorney's for the respondent, upon whom it is to be served, reside in different places, between which there is a regular communication by mail; and an affidavit of service by mail made by a third person, which fails to show the residence of the attorneys for the appellant, is insufficient. (Id.)
20. **PREMATURE APPEAL—DISMISSAL—AFFIRMANCE—STAY OF PROCEEDINGS.**—The dismissal of an appeal as prematurely taken does not operate as an affirmance of the judgment; and, such an appeal being absolutely void, it does not deprive the court below of its jurisdiction, and no stay of proceedings is effected thereunder. (Estate of Kennedy, 384.)
21. **VALIDITY OF APPEAL BOND—CONSIDERATION.**—The validity of an appeal bond given as required by law to make an appeal effectual, the sureties upon which agree to be liable if the appeal is dismissed, is not destroyed by the fact that the appeal is premature, and is not effectually secured. The expense to the respondent in securing a dismissal of the void appeal is a consideration for such undertaking. (Id.)
22. **APPEAL FROM DECREE OF DISTRIBUTION—VOID STAY BOND—WANT OF CONSIDERATION.**—A decree of distribution of the estate of a deceased person does not fall within the provisions of the Code of Civil Procedure authorizing or requiring stay bonds; and a special stay bond given upon appeal from a decree of distribution is void for want of consideration, arising from the fact that the undertaking does not stay the decree, whether the appeal be premature and void, or valid; and no valid judgment can be rendered against the sureties upon such stay bond. (Id.)
23. **APPEAL FROM FINAL SETTLEMENT—DISTRIBUTION PENDING APPEAL—NEW DECREE.**—It seems that if, pending an appeal from the final settlement of the accounts of an administrator, a decree of distribution is made, in case the final settlement is reversed or modified, such decree of distribution may be disregarded, and a new distribution made. (Id.)

See Bill of Exceptions, 1, 4; Divorce, 5; Estates of Deceased Persons, 20, 21, 30; Findings, 2; Injunction, 3, 10; License, 2; Malicious Prosecution, 3; Mortgage, 2; New Trial, 2, 4; Pleadings, 3, 7; Receiver, 13; Street Assessment, 3; Streets, Roads and Highways, 2; Water and Water Rights, 1; Writ of Assistance, 4.

ASSAULT. See Criminal Law, 1-8.

ASSIGNMENT.

1. **SALE OF MINE—WRITTEN CONTRACT—ORAL AGREEMENT FOR COMMISSIONS—ASSIGNMENT OF WRITTEN CONTRACT—BONUS TO ASSIGNEE—RIGHT TO SHARE COMMISSIONS PAID.**—Where the owners of a mine agreed in writing with another person that if he should pay or cause to be paid a specified sum on or before a fixed date, they would bond the mine for an agreed price, and orally agreed to pay him fifteen hundred dollars, if a sale for such price should be affected, and then assigned the written contract to a third person without assigning his right to any part of the agreed commission, and the assignee received a bonus from one who became a purchaser of the mine, such assignee is not entitled to any share in the fifteen hundred dollars paid in execution of such oral agreement. (*O'Toole v. Dolan*, 471.)
2. **CLAIM BY ASSIGNEE TO ONE-HALF OF COMMISSIONS—ISSUE TO AGREEMENT—FINDING AS TO ASSIGNMENT.**—Where the assignee of the contract claimed one-half of the commissions orally agreed upon between the vendors of the mine and his assignors, and in a suit to recover one-half thereof deposited by the vendors of the mine to abide the controversy, alleged that the other half previously paid to the assignor was in full for his share, and that in consideration of the assignment of the contract to him it was agreed between himself and his assignor that the commissions should be equally divided between them, and that the vendors had notice of such assignment and agreement, a finding that no assignment of the commissions made by the assignor of the contract to the assignee, includes a verbal as well as a written assignment, and though not as specific as it should have been, sufficiently passes upon the issue tendered as to whether the agreement was made as alleged, so as to entitle the plaintiff to recover the money deposited by the vendors of the mine. (*Id.*)
3. **OMISSION TO FIND AS TO DEFENDANT'S SHARE.**—Where the findings sufficiently show that plaintiff had no interest in the commissions orally promised by the vendors of the mine, an omission to find upon an issue as to whether defendant had received his full share thereof is immaterial. (*Id.*)
4. **MODE OF EFFECTING SALE IMMATERIAL.**—As to the vendors of the mine, the sale must be deemed to have been effected through the agency of the one to whom the commissioners were promised, and it was immaterial to them what mode was used by him in effecting the sale, whether he personally found a purchaser or found one through the agency of an assignee of the contract. (*Id.*)
5. **CONTRACT FOR SCHOOLHOUSE—ORDER OF TRUSTEES TO COUNTY SUPERINTENDENT—PROTECTION OF ASSIGNEE FOR VALUE.**—Under a contract to build a schoolhouse, where the trustees had issued an order for the payment of installments due the contractor, based upon an estimate properly made by the architect, requiring the county super-

ASSIGNMENT (Continued).

intendent to draw a warrant therefor upon the proper school fund, and such order was assigned for full value by the contractor, the assignee is not bound by any equities or defenses not existing at the time of the assignment of the order and presentation thereof for a warrant for payment; and he is protected against any equities which might subsequently arise in favor of the school district against the contractor. (*Long Beach School Dist. v. Lutge*, 409.)

6. **SUBSEQUENT NOTICE OF CLAIMS FOR LABOR AND MATERIALS.**—A notice to the school district of claims for materials and labor against the contractor, given subsequently to the assignment and presentation of the order of the trustees, cannot create any liability against the school district, or in any manner increase its contract, liability or affect the rights of the assignee. (*Id.*)
7. **SUBSEQUENT BREACH OF CONTRACT—INCREASED EXPENSE.**—The subsequent breach of contract by the contractor, though causing increased expense of the school district for the completion of the contract, cannot affect the right of the assignee of the order to require its payment whenever there should be funds applicable thereto. (*Id.*)
8. **BOND OF CONTRACTOR—REMEDY AT LAW—CANCELLATION OF ORDER—INJUNCTION.**—Where it appears that the school district exacted a bond of the contractor for the fulfillment of his contract, and that he would pay all claims due to subcontractors, laborers, and materialmen, and that the contract should inure to their benefit, there being an adequate remedy at law upon the bond, the school district cannot maintain an action in equity against the assignee of the order to cancel the order and enjoin its payment, on account of any increased expense or nonpayment of claims caused by breach of the contract. (*Id.*)

See Mortgage, 14; Street Assessment, 7; Vendor and Vendee, 1.

ATTACHMENT.

1. **DISSOLUTION—BILL OF SALE AS SECURITY FOR NOTE—WANT OF DELIVERY.**—In an action upon a note, in which an attachment was issued and a motion was made to dissolve it on the ground that it was secured by a bill of sale of a stock of merchandise, evidence that the bill of sale was never delivered to nor accepted by the plaintiffs nor by anyone authorized to receive it, and that there was no delivery of possession of the merchandise, is sufficient to prove that the bill of sale never operated as security for the note, and to sustain an order refusing to dissolve the attachment. (*Rodley v. Lyons*, 681.)
2. **SETTING CAUSE FOR TRIAL—SUFFICIENCY OF NOTICE—DEFENDANT NOT PREJUDICED.**—Where it was admitted upon the motion to discharge the attachment that the only defense to the action would be that the security given for the note should be first exhausted by foreclosure, and that if the attachment was dissolved judgment might be entered for plaintiff to save costs of another suit, the

ATTACHMENT (Continued).

question of security being all that was involved, the defendant cannot be prejudiced by an order setting the case for trial within two days after settling the question of security against the defendant, instead of giving five days' notice of the trial. (Id.)

3. **NONAPPEARANCE OF DEFENDANT AT TRIAL—OBJECTION TO NOTICE—RECITAL IN JUDGMENT—CONSENT OF COUNSEL—CONCLUSIVE FINDING.** Where the judgment recited that counsel for both parties agreed in open court on the hearing of the motion to dissolve the attachment that the cause should be peremptorily set for trial upon the decision of the motion, and was so set for two days thereafter at the time when the motion was denied, such recital is proper and necessary, in view of the nonappearance of the defendant at the trial, on account of objection to insufficiency of the notice of trial, and the finding so made in the judgment is conclusive. (Id.)
4. **CONTRACT MADE AND PAYABLE OUT OF STATE—BILL RENDERED—ACCOUNT STATED.**—Where an express contract was made in the state of New York for the manufacture and sale of hats to be shipped to San Francisco, and paid for in New York, a new and independent contract upon an account stated in this state, upon which an attachment would lie, did not arise from the sending of a bill for hats shipped with request for return of check, the amount of which was not disputed, but to which response was made complaining of the styles and dimensions of hats shipped, and proposing to send a list of what would be desirable on this coast, and asking if the manufacturers could use a certain kind of hats which could not be disposed of, and requesting patience in money matters. An attachment based upon an account stated, under these circumstances, was properly dissolved. (*Beltaire v. George Rosenberg & Sons*, 164.)
5. **ACCOUNT STATED, HOW CONSTITUTED.**—An account stated, in order to constitute a contract, must show upon its face that it is intended to be a final settlement to date, which should be expressed with clearness and certainty. (Id.)
6. **EVASION OF ATTACHMENT LAW.**—Where a contract is made and is payable out of this state, the requirements of the attachment law cannot be evaded or annulled by the creditor sending to his debtor in this state a note or memorandum of the amount due, and thereupon, in case the claim is not disputed, commencing proceedings in attachment as upon a new contract made in this state. (Id.)

ATTORNEY AND CLIENT.

1. **ACTION FOR SERVICES—JUDGMENT UPON COUNTERCLAIM FOR NEGLIGENCE—ADVICE NOT TO FILE LIEN—CONSTRUCTION OF FINDING.**—In an action by an attorney for services rendered, where the defendant recovered judgment upon a counterclaim for damages for negligent advice, upon which issue was joined particularly as to whether the relation of attorney and client existed at the date of the

ATTORNEY AND CLIENT (Continued).

alleged negligence, a finding, not annulled for want of evidence, that on or about that date the defendant sought and obtained of the plaintiff advice as to filing a lien for materials furnished to a contractor, and that plaintiff advised the defendant not to file any lien, for the reason that the contractor was about to file one, should receive such a construction as will uphold the judgment, and, so construed, sufficiently establishes *prima facie* that the relation of attorney and client then existed between the parties. (Perkins v. West Coast Lumber Co., 427.)

2. **ATTORNEYSHIP FOR CONTRACTOR—RELATION NOT ADVERSE.**—The fact that the plaintiff, at the time of the alleged negligence, was the attorney for the contractor, for whom he was about to file a lien against the owner of the property, does not establish an adverse relation which would preclude the relation of attorney and client between the plaintiff and the defendant in the matter of advice as to his right to file a lien against the same property for materials furnished to the contractor; and the defendant's knowledge respecting the attorneyship of plaintiff for the contractor is not material. (Id.)

See Divorce, 6, 7; Pleading, 4-6.

BANKS. See Receiver, 10-12; Taxation.

BILL OF EXCEPTIONS.

1. **SETTLEMENT AFTER DEFAULT—JURISDICTION—EXCUSE NOT APPEARING—APPEAL.**—A judge is without jurisdiction to settle a bill of exceptions presented after the time allowed by law if it fails to disclose any excuse for the delay, or any facts from which the appellant could claim relief from his default, or that he applied therefor. A bill of exceptions so settled cannot be considered upon appeal. (Cameron v. Arcata and Mad River R. R. Co., 279.)
2. **EXTENSION OF TIME—LIMITS OF POWER.**—A judge cannot grant an extension of time to present a bill of exceptions, exceeding in the aggregate a period of thirty days, without the consent of the opposite party. He cannot grant two or more extensions of thirty days each, nor can he grant an extension of time after the moving party has made default. (Id.)
3. **DELAY IN PRESENTATION—REFUSAL OF SETTLEMENT—MANDAMUS.**—Where it appears that the draft of a bill of exceptions, with the proposed amendments thereto, were not presented to the judge nor to the clerk, nor to any deputy clerk for the judge, until several months after the lapse of the time limited for such presentation in section 650 of the Code of Civil Procedure, without any showing of excuse for the delay, the judge is warranted in refusing to settle the bill, and will not be compelled by *mandamus* to settle the same. (Gamache v. Budd, 554.)
4. **ORDER RELATING TO BILL OF EXCEPTIONS—APPEAL—REMEDY.**—An appeal does not lie from an order refusing to amend a bill of exceptions, nor from an order refusing to strike out evidence there-

BILL OF EXCEPTIONS (Continued).

from, nor from an order refusing to settle a proposed bill of exceptions. The remedy for wrongful refusal to settle a bill of exceptions is by *mandamus*, and for wrongful refusal to allow an exception in accordance with the facts is by petition to this court. (Hudson v. Hudson, 141.)

5. **MOTION FOR NONSUIT—INTERPOLATION IN RECORD.**—Where it appears that a motion for a nonsuit was properly denied, a statement interpolated in the bill of exceptions by the judge, that the evidence for the plaintiff was sufficient to meet all the allegations of the bill of complaint, does not injure the defendant, and will be disregarded as an attempt to forestall the questions to be examined upon the evidence brought up. (Hudson v. Hudson, 141.)

BONA FIDE PURCHASER.

1. **QUIETING TITLE—PLEADING—EVIDENCE—PRIORITY OF REGISTRY—BURDEN OF PROOF—REOPENING CASE.**—In an action to quiet title, where the complaint was in the usual form, and the defendant pleaded title, but neither party alleged the source of title, and plaintiff proved a *prima facie* title under execution and rested, whereupon the defendant proved a deed from the execution debtor made long prior to the sale under execution, but recorded after the certificate of sale and prior to the sheriff's deed, the burden of proof was shifted upon the plaintiff to show that he was a *bona fide* purchaser for value without notice of defendant's deed, and the court had discretion to allow plaintiff to reopen his case, and make such proof. (Douglass v. Willard, 38.)
2. **SUFFICIENCY OF FINDINGS.**—Findings that plaintiff purchased the premises for the sum of two hundred dollars, and paid the said amount therefor, and at the time had no notice, actual or constructive, that the premises had been before sold and conveyed to the defendant or to anyone, sufficiently show that plaintiff was a *bona fide* purchaser for a valuable consideration. (Id.)

BONDS.

1. **MECHANIC'S LIEN LAW—CONSTRUCTION OF SCHOOLHOUSE—BOND OF CONTRACTOR—RECITAL OF CONSIDERATION—GUARANTY TO THIRD PERSONS—ESTOPPEL OF SURETIES.**—The validity of a bond given by a contractor for the faithful performance of his contract to build a public schoolhouse, which recites a valuable consideration, and guarantees payment in full of all claims of subcontractors, laborers, and materialmen due to them from the contractor, and states that the bond shall inure to their benefit, does not depend upon the applicability or operation of the mechanic's lien law to a public building. It is sufficient that the bond is not prohibited by law; and persons who bring themselves within the terms of the guaranty may sue the sureties upon the bond, and the sureties are estopped in such action to deny the validity of their undertaking. (Union Sheet Metal Works v. Dodge, 390.)

BONDS (Continued).

2. **EVIDENCE—EFFECT OF BOND UPON PARTY FURNISHING MATERIALS AND LABOR—HARMLESS RULING.**—The admission of evidence to show what effect the making and giving of the bond had upon the plaintiff in furnishing materials and labor to the contractor is harmless. The plaintiff, as matter of law, had a right to rely upon the bond. (Id.)
3. **QUESTION AS TO NATURE OF BOND—PROVINCE OF WITNESS.**—It is not the province of a witness to determine the question whether the bond was a common-law bond or a statutory bond; and it is not error to exclude a question, asked upon cross-examination, as to whether the plaintiff relied upon a statutory bond at the time of entering into the contract. (Id.)
4. **IMMATERIAL FINDING—CONSIDERATION OF LABOR AND MATERIALS—EXECUTION OF BOND—PRESUMPTION.**—A finding that the consideration of the furnishing of the labor and materials was the execution of the bond is immaterial, and need not be supported by the evidence. The bond being for the benefit of the plaintiff, the labor and material are presumed to have been furnished in consideration of the whole contract, including the bond. (Id.)

See Assignment, 8; Irrigation District; Office and Officers, 11; Partnership, 1, 3, 5; Street Assessment, 15.

BROKER.

1. **ACTION FOR BROKER'S COMMISSION—SALE OF REAL ESTATE—WRITTEN CONTRACT ESSENTIAL—ORAL EVIDENCE INADMISSIBLE.**—By the terms of subdivision 6 of section 1624 of the Civil Code, an agreement authorizing or employing an agent or broker to sell real estate for a compensation or commission must be in writing. In an action to recover for services rendered by the plaintiff in effecting a sale of the defendant's land, oral evidence to establish the contract is properly excluded. (McGeary v. Satchwell, 389.)
2. **SALE OF MINE—CONDITION—PROSPECTING BY PURCHASERS—SERVICES OF MINING EXPERT—VOID ORAL BARGAIN FOR COMMISSION.**—An oral agreement between the vendor of a mine and a mining expert well acquainted therewith, made while proposed purchasers under a conditional contract for purchase of the mine, if found satisfactory within a specified period, were in possession and prospecting the mine, that for the services to be rendered by such mining expert in aiding the vendor to consummate the sale, in case the sale was made, he should receive ten per cent of the purchase price, is void, as being in violation of the sixth subdivision of section 1624 of the Civil Code, requiring a contract to pay a commission upon the sale of real estate to be in writing. (Dolan v. O'Toole, 488.)
3. **CONSTRUCTION OF CODE.**—Subdivision 6 of section 1624 of the Civil Code is not confined in its operation to persons who make a business of buying and selling real estate, but includes every person who, in any case, comes within its provisions. (Id.)
4. **EVIDENCE—SUCCESSFUL SERVICES RENDERED TO PURCHASERS.**—The fact that the mining expert at the request of the purchasers gave

BROKER (Continued).

them directions where to work to develop ore, and that his directions were followed successfully, and resulted in such development of ore as induced the purchaser of the mine under the contract, whatever liability it may impose upon the purchasers, cannot aid the recovery by the mining expert against the vendor under the oral contract for commission, and is not admissible evidence in an action against the vendor to recover such commission for the services rendered to the purchasers at his request. (Id.)

BUILDING AND LOAN ASSOCIATION.

1. **MORTGAGE—ASSIGNMENT OF SHARES—REDEMPTION MONEY—CREDITS UPON MORTGAGE.**—Under a mortgage by a member of a building and loan association, where it is part of the contract that when his stock is fully paid up it shall be applied to discharge the mortgage, and the shares are assigned to the association as collateral security for the loan, and the interest and dues are consolidated in the mortgage, the monthly payments are to be regarded as "redemption money," and an implied agreement is raised that they shall be credited upon the mortgage. (Hale v. Barker, 419.)
2. **INSOLVENCY OF ASSOCIATION UNPROVIDED FOR—TERMINATION OF CONTRACT—CREDITS UPON MORTGAGE.**—Where the building and loan association becomes insolvent, and further performance of the contract thereby becomes impossible, the contract is to be deemed terminated, and where there is no provision in the mortgage or in the charter or by-laws of the company for the case of insolvency, in an action by a receiver of the insolvent association to foreclose a mortgage against a member whose shares of stock are pledged as collateral security for the loan, the monthly payments of interest and dues, so far as made, should be credited upon the mortgage. (Id.)

CHURCH.

1. **TRUST—RELIGIOUS ASSOCIATION—UNITED BRETHREN—MAJORITY AND MINORITY SCHISM.**—A conveyance to trustees named therein and their successors in office "in trust for the United Brethren in Christ for camp-grounds, meeting-house, and parsonage purposes," is for the benefit of what is known as the "liberal" church, constituting a majority of that order, and not of the minority known as the "radical" church of the same order. (Horsman v. Allen, 131.)
2. **SECEDING MINORITY OF GENERAL CONFERENCE.**—A small minority seceding from the general conference of a religious body, which is the highest legislative and judicial body in the church, must be regarded as abandoning the church, if there is no such revolutionary usurpation of power in the governing body as to result in a new and substantially different organization, or in such a radical change of the articles of faith as to constitute an essentially different religion from that previously followed by the church. (Id.)

CHURCH (Continued).

3. **ACTION OF GENERAL CONFERENCE—CHANGE IN ORDINANCE OF CHURCH—REVISION OF ARTICLES OF FAITH.**—The general conference of the church, as the highest legislative body therein, cannot bind future conferences by adopting a so-called "constitution" which is in its nature a legislative ordinance, and not a constitution to be adopted by the members of the church; and a change in such "constitution," together with a revision of the "articles of faith" by a subsequent general conference not touching the identity of the organization, or of the general faith of the church, is valid and binding as an ordinance of the church, if not as a constitution. (Id.)

CONSPIRACY. See Corporations, 3; Malicious Prosecution, 1.

CONSTABLES. See Office and Officers, 1, 2.

CONSTITUTIONAL LAW. See Criminal Law, 20, 24; Election; Estates of Deceased Persons, 13; Municipal Corporations, 5-7; Office and Officers, 2, 4; Sanitary District; Schools, 3; Water, and Water Rights, 8, 9.

CONTEMPT. See Criminal Law, 47; Injunction, 10.

CONTRACT.

1. **DEED OF WATER RIGHT—CONTRACT FOR DELIVERY—TOTAL FAILURE OF CONSIDERATION—RECOVERY BACK OF MONEY PAID.**—An action may be maintained to recover back the consideration paid in money for a conveyance of the right to a sufficient quantity of water perpetually to irrigate plaintiff's land at all proper and reasonable times for the irrigation thereof, accompanied by a contract to deliver the water in an open ditch at the most convenient point on the margin of plaintiff's land, where there is a total failure of consideration, owing to an entire breach of the contract, and the entire worthlessness of the deed. (*Richter v. Union Land and Stock Co.*, 367.)
2. **CONSTRUCTION OF CONTRACT—DELIVERY OF WATER AT PROPER AND SEASONABLE TIMES FOR IRRIGATION.**—The contract to deliver the water "at all proper and reasonable times for the irrigation of said land" is to be construed as referring only to the recurring seasons of the year suitable for irrigation, and not as requiring the land to be cleared, ploughed, fenced, or improved as a condition precedent to the defendant's obligation to deliver the water. Where it appears that the defendant did not deliver the water at any season of the year, no allegation or finding "that a proper and reasonable time has existed" is necessary. (Id.)
3. **EXECUTORY CONTRACT—NONPERFORMANCE—FAILURE OF CONSIDERATION—RESCISSION—DAMAGES.**—In all executory contracts the several obligations of the parties constitute to each reciprocally the consideration of the contract, and a failure to perform the contract constitutes a failure of consideration—either partial or total, as the case may be—within the meaning of section 1689 of the Civil

CONTRACT (Continued).

Code, providing for a rescission of the contract for such failure. The remedy for the breach of the contract is not confined to an action for damages. (Id.)

4. **RECOVERY OF CONSIDERATION PAID—RESCISSION BEFORE SUIT—TOTAL FAILURE OF CONSIDERATION—IMPLIED PROMISE TO REPAY.**—Where there is a total failure of consideration under an executory contract, and nothing of value has been received under the contract by the party seeking to rescind, it is not necessary that a formal rescission of the contract be made before bringing suit; but an action can be maintained to recover the consideration paid to the other party, under an implied promise for repayment. (Id.)
5. **RULES OF DILIGENCE AND LACHES INAPPLICABLE—ESTOPPEL OF DEFENDANT.**—In an action involving the rescission of an executory contract, to recover the consideration paid as money had and received to the plaintiff's use, in case of total failure of consideration on the part of the defendant, the authorities bearing upon the questions of diligence and laches do not apply. The defendant in default cannot object that the plaintiff waited too long to bring such action. (Id.)
6. **DEED OF WATER RIGHT TO BE DELIVERED—OBLIGATION IN FUTURE—EXTINGUISHMENT BY JUDGMENT.**—A deed of the perpetual right to a sufficient amount of water to irrigate the land of the grantee, to be taken from the water system of the grantor and delivered by the grantor in a ditch to be constructed to such land, cannot operate as a grant until delivery of the water, and creates merely an obligation to be performed by the grantor *in futuro*, which is extinguished by a judgment for recovery back of the purchase money paid, because of total failure of the consideration. (Id.)
7. **ABSENCE OF VALUE—SUPPORT OF FINDING—LEGAL CONCLUSION.**—A finding that such deed has no value either to plaintiff or the defendant is supported by proof of total nonperformance of the obligation to be performed by the grantor *in futuro*, and is a necessary legal conclusion from findings that defendant never delivered any water to the plaintiff, and had done nothing toward performing its promises and agreements, and that plaintiff received nothing of value from defendant under and by virtue of said water deed or grant. (Id.)
8. **PLEADING—FAILURE TO ALLEGE ABSENCE OF VALUE.**—The failure of the plaintiff to allege specifically in the complaint that the water deed and grant was of no value is immaterial, where facts are alleged from which that fact appears as a necessary conclusion. (Id.)
9. **INTEREST ON AMOUNT RECOVERED.**—Legal interest may be allowed on the amount recovered for money paid under the contract from the date of the payment thereof. (Id.)
10. **SUPPLEMENTAL AGREEMENT—CONSIDERATION.**—A supplemental agreement, either adding to or varying the terms of the original contract, so as to impose new and onerous burdens upon one of the

CONTRACT (Continued).

parties, requires a consideration to support it; and if there is no consideration in some favorable modification or release of previous obligations, and no new consideration appears, the supplemental agreement cannot be sustained. (*Main Street etc. R. R. Co. v. Los Angeles Traction Co.*, 301.)

11. **"EXPLANATORY" AGREEMENT—ORIGINAL CONSIDERATION.**—The fact that the supplemental agreement is also described as "explanatory" of the first agreement executed at a previous date is not conclusive that it was part of the original agreement, though not included in the writing, so as to be supported by the original consideration. (*Id.*)
12. **PLEADING—WANT OF CONSIDERATION—DEMURRER.**—An answer pleading a want of consideration for a supplemental agreement which impose a new and onerous burden on the defendant, and does not disclose any consideration therefor on its face, presents a sufficient defense to an action based thereon, and a demurrer thereto is improperly sustained. (*Id.*)
13. **REPUDIATION OF CONTRACT.**—It is not in the power of one of the parties to a contract to discharge it by repudiating it. Upon such repudiation, the other party may regard it as discharged, but not the party in fault. (*Id.*)
14. **UNSEALED CONTRACT OF CORPORATION—EVIDENCE—EXECUTION AND AUTHORITY OF OFFICERS UNPROVED.**—A contract purporting to be executed in the name of a corporation by its president and secretary, but not bearing the corporate seal, is not admissible in evidence against the corporation, in the absence of proof of the genuineness of the signature of the officers, and that they were authorized to execute the contract on behalf of the corporation. (*Fontana v. Pacific Can. Co.*, 51.)
15. **CONTRACT RELATING TO STOCK—SEAL UPON CERTIFICATES.**—The fact that the unsealed contract related to the transfer of stock of the corporation, the certificates of which were under seal, is immaterial, and cannot tend to show that the unsealed contract was sealed, or was authorized by the corporation. (*Id.*)
16. **ACTION UPON CONTRACT—MOTION FOR NONSUIT—GENERAL STATEMENT OF GROUNDS—INCURABLE DEFECTS—INAPPLICABLE RULE.**—In an action upon such contract, a motion for nonsuit, stating generally "that no valid contract between the parties has been offered in evidence, and no proof has been made showing the plaintiff is entitled to any judgment as against the defendant," though not sufficiently specific to bring it within the ordinary rule applicable to such motion, is not within that rule, where it appears that the defects of plaintiff's case are incurable, if they had been specifically pointed out. It appearing that there was utter failure to prove authority for the contract, and that, under a proper construction

CONTRACT (Continued).

of the contract, the plaintiff had no cause of action, the motion for nonsuit should have been granted. (Id.)

17. **CONSTRUCTION OF CONTRACT—OPTION TO PURCHASE STOCK OR TO RESCIND—GUARANTY OF DIVIDENDS.**—A conditional contract for the transfer of stock by a corporation to a partnership in consideration of its note at six per cent providing for an option to pay the note and take the stock from escrow before a fixed date, or to rescind the contract on or before such date and guaranteeing dividends on the stock to the firm from the date of the contract, and to make good to the firm all deficiencies below ten per cent per annum, and, if none are paid, to pay the firm ten per cent per annum on the amount of the note from date until rescission, is to be construed as providing not for annual dividends, and for treating each year as separate, but that the total dividends declared while the contract is to run shall amount to ten per cent per annum. (Id.)
18. **ELECTION TO RESCIND—FULFILLMENT OF GUARANTY—NO CAUSE OF ACTION.**—Where the firm elected to rescind the contract, and, at the time of rescission, the total dividends declared exceeded ten per cent on the amount of the note, after deducting the interest thereon, the firm has no cause of action against the corporation. (Id.)
19. **CONTRACT WITH WATER COMPANY—BLANK EXHIBIT TO BE EXECUTED—CERTAINTY.**—A contract with a water company, in which it agreed in consideration of the transfer to it of certain stock and other privileges, to furnish a specified quantity of water, and a transfer of said water rights to be drawn upon the form adopted by the corporation annexed as a blank exhibit, and subject to its terms and conditions, to be executed between the parties and subject to the reasonable rules and regulations of the company not conflicting with the contract or the agreement to be executed, is not rendered void for uncertainty by the absence from the blank exhibit of the price of the water right and the annual rent to be paid. The price was fixed by the consideration received, and the annual rent or rate was a mere incident to the agreement, subject to reasonable change as circumstances may require. (Sample v. Fresno Flume etc. Co., 22.)
20. **REASONABLE INTERPRETATION—VALIDITY OF CONTRACT.**—The contract should receive a reasonable interpretation, and such that would give it effect, instead of that which would make it void; and where taking the two papers together, and having in view the circumstances under which the contract was entered into, the meaning and intention of the parties can be understood with sufficient clearness, the validity of the contract must be sustained. (Id.)
21. **BREACH OF CONTRACT—ACTION FOR DAMAGES—PENDING INJUNCTION NOT A DEFENSE.**—The water company is liable in an action for damages for breach of its contract to furnish the water as agreed,

CONTRACT (Continued).

where the findings establish that it completed its flumes and ditches to and beyond the point at which it agreed to deliver it, and that in the exercise of reasonable diligence it could have delivered the water, and failed to do so. It is no defense to such action that, at suit of another corporation, the defendant has been enjoined from diverting sufficient water to comply with the contract, and that such injunction is still pending. (Id.)

22. **EXCUSE FOR NONPERFORMANCE—PREVENTION—INABILITY—IMPOSSIBILITY.**—An injunction at suit of a private litigant is not a prevention by operation of law, nor by an irresistible superhuman cause, and is not a legal excuse for nonperformance of the contract. If what is agreed to be done is possible under any circumstances, notwithstanding any difficulty or inability of the party, under unforeseen circumstances, to comply with the contract, he must make compensation in damages for nonperformance. The impossibility which will excuse nonperformance must consist in the nature of the thing to be done, and not in the inability of the party to do it, unless such inability is provided against in the terms of the contract. (Id.)

23. **DELAY IN DETERMINING INJUNCTION SUIT—MODIFICATION.**—Where great delay is apparent in determining the injunction suit and no steps had been taken after the lapse of several years to have the injunction dissolved, but it appears that it was modified to permit the defendant to divert some water, it cannot be left optional with the defendant to comply with its contract or not as its convenience may dictate. (Id.)

24. **RETENTION OF CONSIDERATION.**—The defendant cannot retain the consideration paid for carrying out the contract, and refuse or neglect to carry out its part thereof. (Id.)

See Assignment; Attachment; Broker; Divorce, 6, 7; Fraud; Guaranty; Joint Debtors; Mechanics' Liens; Reformation; Sale; Specific Performance; Statute of Limitations; Street Assessment, 1, 2, 7, 14; Water and Water Rights, 7-9.

CORPORATIONS.

1. **ACTION AGAINST CORPORATION—INTEREST OF PRESIDENT AND DIRECTORS—ADMISSIONS OF ANSWER—INTERVENTION BY STOCKHOLDER.**—In an action brought against a corporation by an assignee for the use of the president and two directors thereof, constituting a majority of the board, in which the answer of the corporation admits all the causes of action alleged, a stockholder may intervene to assert the rights of the corporation against the plaintiff, and need not aver a request to the corporation officers to defend the action. (*Shively v. Eureka Tellurium Gold Min. Co.*, 293.)
2. **COUNTERCLAIM FOR UNPAID ASSESSMENTS—ADMISSIONS OF CORPORATION—INSUFFICIENT PLEADING AND FINDINGS.**—Under a counterclaim in the complaint in intervention for indebtedness of the plain-

CORPORATIONS (Continued).

tiff's assignors to the corporation for unpaid assessments on stock held by them, the admissions made in the answer of the corporation cannot sustain a finding against the plaintiff, where there was no evidence of the assessment found; and where there is no allegation or finding of facts necessary under the provisions of the Civil Code to create a personal liability on the stockholders for the alleged assessment, the counterclaim cannot be sustained. (Id.)

3. AVERMENTS OF FRAUDULENT CONSPIRACY—ABSENCE OF FINDINGS.—

Where the complaint in intervention makes averments that the suit was brought for the use and benefit of the president and two directors of the corporation defendant, and that the claims sued upon were concocted in pursuance of a conspiracy to defraud the company of its mine and mining property, in the absence of findings disposing of the issues thus tendered, judgment cannot be rendered for the plaintiff upon the findings made in his favor. (Id.)

4. LIABILITY OF STOCKHOLDER UPON NOTES—PLEADING—UNCERTAINTY

WAIVED BY DEFAULT.—In an action to recover from the defendant as a stockholder in a corporation his proportion of certain unpaid notes executed by the corporation when he was a stockholder, where the complaint alleges that "at and during the times said debts and liabilities were contracted and incurred, the defendant was a stockholder in said corporation," giving the number of shares of stock, and praying judgment for a sum alleged to be "the proportion of said indebtedness for which the defendant is liable to the plaintiff," states a sufficient cause of action to support a judgment by default; and any uncertainty in not alleging with definiteness the times when the corporation incurred the indebtedness for which the notes were given is ground only of special demurrer, which was waived by the default. (Whitehurst v. Stuart, 194.)

5. INFERENTIAL AVERMENT ADMITTED BY DEFAULT.—

The allegation of the complaint, as made, was an inferential averment that the debts and liabilities of the corporation represented by the notes were contracted and incurred while the defendant was a stockholder therein to the amount alleged. This was a defective statement of a material fact, which, if objected to, might have been cured by amendment of the complaint. Under a denial of the averment, as made, evidence was admissible to prove the truth of such inferential averment, and a default admits its truth. (Id.)

6. CLAIM FOR "PROPORTION OF INDEBTEDNESS."—

The averment and prayer for judgment relating to the "proportion of said indebtedness for which the defendant is liable to the plaintiff" indicates a claim for the defendant's proportion of the indebtedness of the cor-

CORPORATIONS (Continued).

poration evidenced by the notes, and not a claim for recovery upon the notes. (Id.)

7. **MUTUAL ENDOWMENT ASSOCIATION—ACTION BY MEMBER AGAINST DIRECTORS—RECOVERY BACK OF PAYMENTS—ASSENT TO RULES.**—One who has voluntarily made payments under a certificate of membership in a mutual endowment association, which assumed to be and was doing business in the style of a corporation and which had passed through the regular form of incorporation, and had elected directors and adopted by-laws, is bound by his own acts and by the articles of association and by-laws to which he had assented before the payments were made; and cannot maintain an action against the directors individually, based upon an alleged failure to incorporate, to recover back the moneys which were regularly paid in and out under the articles of association and by-laws, with full knowledge of the plaintiff as to the disposition required thereby to be made of such moneys by the directors. (Meyer v. Bishop, 204.)
8. **FAILURE OF SCHEME—PAYMENT TO CHOSEN AGENTS—MONEY HAD AND RECEIVED—PERSONS IN PARI DELICTO.**—The members of such an association, who have continued for years to pay to their chosen agents money to be expended in a specified way, cannot, after the failure of the scheme, sue their chosen agents in an action for money had and received to recover back the sums so paid. They are *in pari delicto*, and must share the loss. (Id.)
9. **DISCONTINUANCE OF BUSINESS BY DIRECTORS.**—A suggestion that the defendant directors discontinued the business without sufficient cause cannot avail the plaintiff in an action to recover back moneys paid to them upon the alleged ground that there was no incorporation, which is not based upon any charge that such moneys were wasted or misappropriated by the defendants, and in which no damages were claimed for the improper discharge of the duties of their express trust as directors, but in which they are only sought to be charged as involuntary trustees of money had and received from the plaintiff. (Id.)
10. **CASE AFFIRMED AND APPLIED.**—The case of *Perkins v. Fish*, 121 Cal. 317, affirmed and applied as being on all fours with the present case. (Id.)

See Building and Loan Association; Contract, 14-24; Municipal Corporations; Receiver; Street Railroad.

COSTS.

1. **CONSTRUCTION OF CODE—MOTION TO RETAX COSTS—FILING OF SECOND NOTICE.**—Section 1033 of the Code of Civil Procedure, which provides that "a party dissatisfied with the costs claimed may within five days after notice of the filing of the bill of costs, file a motion to have the same taxed by the court in which the judgment

COSTS (Continued).

was rendered or by the judge thereof at chambers," is not to be construed literally so as to subvert the settled practice of serving and filing a written notice of the motion, specifying the objections to the cost bill and the time when the application to the court or judge will be made to correct or strike it out; and such practice is a substantial compliance with the statute. (*Carpy v. Dowdell*, 244.)

2. **CODE MAXIM—SUBSTANCE OF LAW PREFERRED TO FORM.**—It is one of the maxims of the law, embodied in section 3528 of the Code of Civil Procedure, that the law respects form less than substance. (*Id.*)

See *Negotiable Instruments*, 3, 4.

COUNTIES. See *Injunction*, 11; *Office and Officers*; *Swamp and Overflowed Land*.

CRIMINAL LAW.

1. **ASSAULT WITH INTENT TO MURDER—VOID VERDICT—DISCHARGE OF JURY WITHOUT CONSENT—JEOPARDY—ACQUITTAL.**—Under an information charging a defendant with an assault with intent to commit murder, a void verdict for an assault with a deadly weapon, an offense not included in the charge, constitutes no legal reason for a discharge of the jury without the consent of the defendant; and in case of such discharge appearing to have been made without his consent, entered upon the minutes of the court, the defendant upon a second trial is entitled to an acquittal upon a plea of once in jeopardy and a former acquittal. (*People v. Arnett*, 306.)
2. **ASSAULT WITH INTENT TO COMMIT RAPE—GIRL UNDER AGE OF CONSENT—FORCE AND CONSENT NOT INVOLVED.**—Upon the trial of a defendant accused of an assault with intent to commit rape upon a young girl under the age of legal consent, neither the element of force nor the question of consent has any application. The prosecutrix could not consent, and the law resists for her. (*People v. Roach*, 33.)
3. **INTENT OF DEFENDANT, HOW JUDGED.**—The intent of the defendant is to be judged by his conduct, and not by the conduct of the prosecutrix. (*Id.*)
4. **EVIDENCE—DECLARATION OF DEFENDANT.**—Evidence is admissible to prove a declaration of the defendant made shortly after the assault, which tended to cast some light upon his intent, and which had reference to his encounter with the prosecutrix. (*Id.*)
5. **ASSAULT WITH INTENT TO COMMIT RAPE—CONSENT OF GIRL UNDER AGE OF CONSENT.**—Upon the trial of a defendant accused of an assault with intent to commit rape upon a girl under the age of consent, the fact that the girl went voluntarily to the room of the defendant by previous appointment, and made no resistance, is im-

CRIMINAL LAW (Continued).

material, and can constitute no defense to the charge. The law, in such case, conclusively implies incapacity of the girl to give consent; and the law resists for her, regardless of her actual state of mind at the time. (*People v. Vann*, 188.)

6. EVIDENCE—AGE OF PROSECUTRIX—MEMORANDA—ENTRY IN BIBLE—PHYSICIAN'S CASH-BOOK.—The mother of the prosecutrix, in testifying to her age, may refresh her memory as a witness from an entry made by her in the family Bible shortly after the birth; and the physician who attended at the birth may refresh his memory as a witness from an entry made by him at the time in his cash-book. It is not necessary that such written memoranda should be admissible in evidence. (*Id.*)
7. ADMINISTERING WINE TO PROSECUTRIX—UNTENABLE OBJECTION TO EVIDENCE.—Evidence is admissible to show that about one hour before the assault the defendant gave wine to the prosecutrix, which she drank. It is not a tenable objection to such evidence that it may tend to prove that defendant administered intoxicating narcotics with intent to prevent the prosecutrix from resisting, and that defendant is not charged therewith in the information. (*Id.*)
8. MISCONDUCT OF DISTRICT ATTORNEY—REQUEST TO BYSTANDERS—QUESTIONS TO WITNESSES.—Where it appears that the court carefully guarded the rights of the defendant, and that the district attorney did not act through passion or prejudice, or with intent to injure the defendant, it was not prejudicial misconduct for him to request the bystanders to retire while the prosecutrix was testifying, nor to ask objectionable questions of witnesses, which could not have injured the defendant. (*Id.*)
9. ACCESSARIES—CONCEALING KNOWN FELONY—PROTECTING PERSON CHARGED—CONSTRUCTION OF PENAL CODE.—Under section 32 of the Penal Code, which provides that "all persons who, after full knowledge that a felony has been committed, conceals it from the magistrate, or harbor and protect the person charged therewith, or convicted thereof, are accessaries," the word "conceal" means more than mere silence or a simple withholding of knowledge that a felony has been committed, and necessarily includes some affirmative act tending toward the concealment of its commission; and the word "charged" imports a formal complaint, information, indictment, or arrest upon a criminal charge, and does not include mere general rumors and common talk that a person has committed a felony. (*People v. Garnett*, 364.)
10. ACCESSARY TO GRAND LARCENY—GOOD AND BAD CHARGES IN INFORMATION—VERDICT NOT SUPPORTED—NEW TRIAL.—An information accusing a defendant of being an accessory to the crime of grand larceny, under two charges that he did willfully "conceal" the

CRIMINAL LAW (Continued).

felony from the magistrate, after full knowledge that it had been committed, and did "harbor and protect" the person who committed the crime, without alleging that such person was "charged with a felony," is insufficient, and amounts to nothing as respects the charge of harboring and protecting such person. Where evidence was introduced under both charges, and both were considered by the jury, a verdict of "guilty as charged in the information" cannot be supported, and a new trial must be granted. (Id.)

11. **INSUFFICIENT CHARGE SHOULD BE KEPT FROM JURY.**—The insufficient charge in the information should have been kept from the jury, and no evidence should have been allowed thereunder. The case should have been tried upon the sole theory that the defendant was charged with concealing the commission of the felony from the magistrate. (Id.)
12. **HOMICIDE—MOTION FOR CONTINUANCE.**—Where it appears that the defendant, accused of murder, was allowed an opportunity to and did procure the attendance of witnesses, and was represented by two able counsel, appointed by the court, a motion for continuance based upon the absence of the witnesses and the lack of sufficient counsel, upon an affidavit based upon information and belief, which contained no showing of diligence to procure the testimony specified, nor that the continuance was not sought for delay, and which stated that defendant's mother was endeavoring to negotiate for the services of an additional attorney, was properly denied. (People v. Putnam, 258.)
13. **ATTENDANCE OF WITNESS CONFINED IN STATE'S PRISON—DEPOSITIONS.**—The court may order the attendance of witnesses who are confined in the state's prison, when it appears to the satisfaction of the court that such attendance is necessary. But an order for such attendance does not issue as matter of right; and the court may, in its discretion, refuse to require the attendance of particular witnesses so confined, and may allow their depositions to be taken. (Id.)
14. **EVIDENCE—IMPEACHMENT OF WITNESS—CONVICTION OF FELONY—ANSWER OF QUESTION RULED OUT.**—It is permissible to ask a witness who has been convicted of felony the nature of the felony of which he has been convicted. Where the witness answers such a question, although the objection thereto is sustained by the court, if the answer is not stricken out, the defendant is not injured. (Id.)
15. **IRRELEVANT REMARKS OF DISTRICT ATTORNEY—INSTRUCTIONS.**—Remarks made by the district attorney outside the issues, which were objected to by the defendant, and which the jury were especially instructed by the court to disregard, and which did not reach a course of proceeding militating against justice and the fair and orderly conduct of the cause, are not ground of error. (Id.)

CRIMINAL LAW (Continued).

16. **INSTRUCTION—TESTIMONY OF CONVICT WITNESSES.**—An instruction that the jury were not arbitrarily to reject the testimony of convict witnesses simply because they were convicts, but that their testimony should be considered and weighed in accordance with the rules of evidence, does not in effect tell the jury to disregard the fact that they had been convicted of a felony in weighing their testimony. (Id.)
17. **—ASSUMPTIONS OF FACT IN INSTRUCTIONS—HOMICIDE.**—Instructions may assume facts admitted or proved without the shadow of a conflict of evidence; and where there is no dispute or question of the fact of the homicide, it is not a charge as to a matter of fact to refer to it in an instruction. (Id.)
18. **HOMICIDE—PROPER INSTRUCTIONS AS TO MOTIVE.**—Upon the trial of a defendant accused of murder, it is proper to instruct the jury that motive is not the ultimate fact to be proved; and that, if the crime is sufficiently proved, it does not matter whether there is a motive or not; but that, in a case depending upon circumstantial evidence, the presence or absence of motive is matter of corroboration, and makes other evidence more or less persuasive, and diminishes or increases the presumption of innocence. (*People v. Vereseneckcockcockhoff*, 449.)
19. **IMPROPER INSTRUCTIONS AS TO MOTIVE—PROBATIVE FORCE OF EVIDENCE—CHARGE UPON MATTER OF FACT.**—An instruction requested by the defendant that "it is against all experience and reason to suppose that a man will imperil his own life and inflict upon another a brutal crime without a motive, and in the mere wantonness of depravity," involves no rule of law, but is only as to the probative force of evidence, and is properly refused. A charge given by the court that "it may be impossible to show or establish a motive, for the reason that we cannot fathom the mind of the accused on trial, and ascertain if there is not a hidden desire of vengeance or some passion to be gratified," is an argument against the defendant on the facts, and is an improper charge as to a matter of fact. (Id.)
20. **CONSTRUCTION OF CONSTITUTION—PROVINCE OF COURT AND JURY.**—Section 19 of article III of the constitution, providing that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law," refers to the province of the jury to determine all matters of fact, and of the court to determine the law, and forbids either the judge or the jury to trespass upon the province of the other. The court must not charge or advise with respect to matters of fact, and its power to state the testimony is exclusive of any other power of the court in its charge in respect to the evidence; and the prohibition upon it is co-extensive with the exclusive province of the jury. (Id.)

CRIMINAL LAW (Continued).

21. **RELATIVE FORCE OF DIRECT AND CIRCUMSTANTIAL EVIDENCE—INSTRUCTION AS TO MATTER OF FACT.**—The law declares nothing as to the relative probative force of direct or circumstantial evidence; and it is wholly matter for the jury to determine, according to their convictions, from the evidence. An instruction to the jury that circumstantial evidence is not entitled to a less degree of credit than direct evidence, and that circumstances are not likely to be fabricated, is an instruction as to matter of fact within the prohibition of the constitution. [McFarland, J., Garoutte, J., and Van Dyke, J., dissenting.] (Id.)
22. **CASES OVERRULED.**—*People v. Cronin*, 34 Cal. 191, and cases affirming the doctrine of that case as to the relative weight of direct and circumstantial evidence, overruled. [McFarland, J., Garoutte, J., and Van Dyke, J., dissenting.] (Id.)
23. **INAPPLICABLE DECISIONS AS TO WEIGHT OF CIRCUMSTANTIAL EVIDENCE.**—The decisions made by the courts of other states in relation to the relative weight of direct and circumstantial evidence, where the trial judges were free from any constitutional or statutory restrictions upon their power to sum up the evidence, are inapplicable under our constitution. (Id.)
24. **EFFECT OF PRIOR DECISIONS—CONSTRUCTION OF CONSTITUTION—POWER OF JUDGES TO CRITICISE EVIDENCE.**—Though it is conceded to be a proper rule of construction that the words of our constitution are to be construed in the same sense that had been previously fastened upon similar language by the decisions of other states, yet there are no authoritative decisions of other states which have fastened upon the language of our constitution the construction that judges may, in their charges to juries, criticise the weight and credibility of evidence. (Id.)
25. **HOMICIDE—EVIDENCE—FLIGHT OF DEFENDANT—SUGGESTION OF THIRD PERSON.**—While the actual flight of a defendant accused of murder is evidence of guilt, the advice or suggestion of third persons to the defendant that he should flee is not admissible against him. (*People v. Lee Dick Lung*, 491.)
26. **LETTERS FOUND UPON PRISONER—SUGGESTION TO CHANGE RESIDENCE—HARMLESS ERROR.**—Letters found upon a Chinese prisoner charged with murder, written from one Chinese society to another, giving warning of his probable arrest, and requesting direction to him that he might change his residence, are inadmissible, in the absence of proof tending to connect him with the sender, and to show that he acted upon their contents. But where he subsequently admitted that he did change his residence upon the suggestion of the letters, the admission of them in evidence is harmless error, though upon a second trial they should not be placed before the jury. (Id.)
27. **BAD CHARACTER OF SOCIETY SENDING LETTERS—PREJUDICIAL ERROR.** Evidence of a witness for the people that the Chinese society send-

CRIMINAL LAW (Continued).

the letters was a highbinder secret society, which could be hired for murder or blackmail, is inadmissible, and its admission is prejudicial error, in the absence of evidence tending to show that the defendant was a member of such society. The fact that he had a letter therefrom in his possession does not tend to show that he was a member thereof, or to connect him therewith, so as to justify such evidence. (Id.)

28. **IMPEACHMENT OF WITNESS.**—Evidence of the bad character of such society is not admissible for the purposes of degrading and impeaching the defendant as a witness. Neither the defendant nor any witness can be impeached or degraded in that way. (Id.)

29. **HOMICIDE—MANSLAUGHTER—MISTAKE OF DEFENDANT—PURSUIT OF UNKNOWN FUGITIVE FROM JUSTICE.**—If a defendant accused of murder mistook the deceased, who was shot while running from him after being ordered to stop, for a fugitive from justice unknown to the defendant, who had stabbed another man, and of whom the people of the village, including the defendant, were in pursuit, and if the killing was the result of such mistake, it was without malice, and could not amount to more than manslaughter. (*People v. Melendrez*, 549.)

30. **REASONABLE CAUSE FOR MISTAKEN BELIEF—PROVINCE OF JURY—IMPROPER INSTRUCTION.**—Where there is a state of the evidence from which the jury might find that the killing was the result of a mistake in attempting to arrest the wrong person, while lawfully seeking to arrest a fugitive who had committed a felony, it is the province of the jury to determine whether the defendant had reasonable cause to believe that the deceased was the person who had committed the felony; and an instruction taking that question from the jury, and stating that in contemplation of law, assuming all the evidence to be true, the defendant had no reasonable cause so to believe, and that he was guilty of an unlawful act if he attempted forcibly to arrest the deceased, is improper, and derogates from the constitutional functions of the jury. (Id.)

31. **QUESTION OF LAW AS TO REASONABLE CAUSE—APPLICABILITY OF RULE.**—The rule applied in favor of a defendant, that where, upon the undisputed facts before the jury, the defendant had reasonable cause to believe at the time of the killing that the deceased had committed a felony, it was the duty of the court so to instruct the jury, cannot be applied against the defendant in a criminal case to establish a want of probable cause for a mistaken belief. (Id.)

32. **REASONABLE DOUBT—ABSENCE OF MALICE—IMPROPER INSTRUCTION.** An instruction to the effect that before the jury would be warranted in returning a verdict of manslaughter they should be satisfied from the evidence beyond a reasonable doubt that the de-

CRIMINAL LAW (Continued).

fendant without malice killed the deceased is erroneous; and though the law is elsewhere correctly given, the error cannot be deemed without prejudice, where the court took the question of acquittal from the jury, and left it to them only to determine the grade of the offense. (Id.)

33. **HOMICIDE—CIRCUMSTANTIAL EVIDENCE—DIFFERENCE IN WEIGHT OF BULLET.**—Where the circumstantial evidence that the defendant committed the crime of murder with which he was charged was such that the jury was justified in finding that the bullet which killed the deceased was shot from a rifle borrowed by the defendant, the mere fact that the distorted bullet found in the body weighed four grains less than an intact model bullet shot from the same rifle, the loss in the weight of which was accounted for in the testimony of a gunsmith, cannot be ground for setting aside the verdict of the jury whose province it is to weigh the evidence and decide upon the credibility of witnesses. (People v. Sullivan, 557.)
34. **TRACING OF GUN—DISPOSITION BY DEFENDANT—FLIGHT.**—It was competent for the prosecution to trace the gun borrowed by the defendant from the time it came into his hands until finally located in the possession of the party producing it, and to prove the disposition made of it by the defendant in a distant town, in connection with his departure from the neighborhood immediately after the homicide, and then absenting himself from the state, as a circumstance tending to show flight and guilty knowledge. (Id.)
35. **ADMISSIBILITY OF GUN.**—Where the gun was fully traced and identified, and it was shown that both before and after borrowing it the defendant had threatened to kill the deceased, and was seen going with it shortly before the homicide toward the place where the homicide was committed, the gun is admissible in evidence. (Id.)
36. **IDENTIFICATION OF ACQUAINTANCE—HARMLESS RULING.**—The admission of the testimony of a witness as to his knowledge that an acquaintance was a one-armed man, in response to a question objected to as to how many arms such person had, probably asked for the purpose of identification, or to test the acquaintance of the witness, is harmless, where it is not shown and cannot be seen how the answer to the question could prejudice the defendant. (Id.)
37. **MISCONDUCT OF JURY—INTOXICATION OF JUROR—CONFLICTING EVIDENCE—OBSERVATION BY JUDGE—FINDING.**—Where a new trial was sought for misconduct of the jury, in that one of the jurors became intoxicated near the close of the trial during a recess, so that he was too drunk to understand the instructions and properly to consider the case, and the evidence was conflicting, and the trial judge, having the best opportunity to observe the condition of the

CRIMINAL LAW (Continued).

juror, found that he was not incapacitated, his finding will not be disturbed upon appeal. (Id.)

38. **EVIDENCE OF MISCONDUCT—EXCLUSION OF ORAL TESTIMONY—AFFIDAVITS.**—The exclusion of oral testimony of witnesses subpoenaed by the defendant in support of the charge of misconduct is not prejudicial, where the affidavits of each of the witnesses was presented, if there is no showing that any one of them had refused to testify fully by affidavit to all the material facts within his knowledge. The law allows no difference between affidavits or depositions or oral testimony when offered in support of motions. (Id.)
39. **CROSS-EXAMINATION OF AFFIANTS—DISCRETION OF COURT.**—It is in the discretion of the court to allow or to refuse to allow the cross-examination of witnesses who testify upon motion for new trial by affidavits or counter-affidavits on the question of misconduct. (Id.)
40. **HOMICIDE—SUPPORT OF VERDICT—INSTRUCTIONS AS TO JUSTIFIABLE HOMICIDE—APPEARANCE OF DANGER.**—A verdict of guilty of murder in the second degree will not be disturbed as contrary to the evidence or to the instructions of the court, where there is no pretense that the defendant was in actual danger at the time of the killing, and the jury might find from the evidence that he was not actuated by a reasonable fear that the deceased was about to kill or severely injure him when he killed the deceased, and the court gave full and correct instructions on the law of justifiable homicide and appearance of danger and told the jury that if they had a reasonable doubt as to whether the defendant had reason to believe, as a reasonable man, that he was in danger of being killed or severely injured by the deceased at the time he shot deceased, they should acquit the defendant. (People v. Mitchell, 584.)
41. **GOOD CHARACTER OF DEFENDANT—INSTRUCTION.**—An instruction to the effect that the good character of the defendant for peace and quietness, if proved to the satisfaction of the jury, is to be considered in connection with the other facts of the case, and kept in view in all their deliberations, and that they are to acquit the defendant if they have a reasonable doubt of his guilt in view of all the evidence, but that if the evidence convinces them beyond a reasonable doubt of his guilt, they must so find, notwithstanding his good character, is correct, and does not imply that the evidence of good character is not to be considered in determining the question of guilt. (Id.)
42. **FAMILIARITY OF DECEASED WITH DEFENDANT'S WIFE—IRRELEVANT AND HEARSAY EVIDENCE—HARMLESS RULING.**—Irrelevant evidence as to the interchange of Christmas presents between the deceased and the wife of the defendant, and hearsay evidence as to common talk and scandal coming to the ears of a witness as to the atten-

CRIMINAL LAW (Continued).

tions of deceased to defendant's wife, were properly excluded. Their exclusion could not have harmed the defendant where it was abundantly shown without objection that the defendant had occasion to be and was jealous of the deceased, and the defendant had the benefit of whatever advantage might accrue to him from presenting to the jury the real or supposed wrong which deceased had done him in his domestic relations. (Id.)

43. **NEWLY DISCOVERED EVIDENCE—DISCRETION.**—Where it does not appear that the court abused its discretion in not granting a new trial on the ground of newly discovered evidence, its order denying a new trial will not be disturbed on that ground. (Id.)

44. **INSANITY OF DEFENDANT—COMMITMENT TO ASYLUM PENDING TRIAL—HABEAS CORPUS—RETURN FOR TRIAL.**—Where a defendant accused of crime was committed to an insane asylum pending his trial, if the superintendent of the asylum does not return him for trial after he becomes sufficiently sane for the purposes of his defense, this court has the power, and it is its duty, upon *habeas corpus*, to order him into the custody of the court where the charge is pending against him. (In re Buchanan, 330.)

45. **QUESTION OF SANITY, HOW JUDGED—CONSTRUCTION OF STATUTE.**—The question whether the defendant has become sufficiently sane to be tried is not to be judged according merely to the medical view of sanity or insanity, but is to be determined with reference to the statute, which is to be construed as in affirmance of the common-law principle that if a person arraigned for a crime is capable of understanding the nature and object of the proceedings against him, and can conduct his defense in a rational manner, he is deemed sane for the purpose of being tried, though on some other subjects his mind may be deranged or unsound. (Id.)

46. **UNDERSTANDING OF DEFENDANT—CLAIM OF RIGHT TO TRIAL.**—Where it appears upon the examination had upon *habeas corpus* that the defendant reasons as other men do, that his memory is unimpaired, that he fully appreciates the nature of the criminal charge against him, and understands his position relative thereto, and is master of his own defense, and claims the right to a trial upon the criminal charge against him, the law sustains him in his claim. (Id.)

47. **WITNESS BEFORE GRAND JURY—REFUSAL TO ANSWER—PERTINENCY OF QUESTIONS—INCRIMINATION OF WITNESS—CONTEMPT.**—Where a witness who was subpoenaed before the grand jury to testify upon the examination of a charge against another person for forging a check given in payment of the interest of an alleged heir to an estate, whose existence was a subject of inquiry, refused to answer questions propounded to him, including a question as to whether the accused did not inform the witness that the alleged heir was

CRIMINAL LAW (Continued).

not the legal heir of the deceased, on the grounds that the questions were not pertinent to the matter under inquiry, and that the answers might tend to incriminate him and degrade his character, it is sufficient to sustain a punishment for contempt for refusal to answer that the one question so included appears to have been pertinent to the charge under inquiry, and that it did not appear and was not fairly shown to the court that an answer of the witness thereto would have a tendency to incriminate him or to degrade his character. (In re Rogers, 408.)

DAMAGES. See Contract, 3; Fraud, 3, 4; Pleading, 9; Sale, 1-3.

DEBTOR AND CREDITOR. See Insolvency; Joint Debtors.

DEDICATION. See Streets, Roads and Highways, 10.

DEED. See Contract, 1, 6; Mines and Mining, 5.

DEPOSITIONS. See Husband and Wife, 3.

DIVORCE.

1. **EXTREME CRUELTY—PLEADING—DEMURRER—MOTION FOR JUDGMENT.**
In action for divorce where the complaint states sufficient acts of cruelty to constitute the statutory offense of extreme cruelty, a general demurrer thereto and a motion of defendant for judgment on the pleadings are properly overruled. (Hudson v. Hudson, 141.)
2. **TRIAL BY JURY—DISCRETION—REQUIRING OF DEPOSIT BY WIFE.**—It is discretionary with the court to allow or refuse a jury trial of certain issues in an action for divorce; and where it is demanded by the wife, without the consent of the husband, to try issues of adultery charged by the wife, the court has discretion to require the wife to deposit with the clerk one day's per diem and mileage of the jury, as a condition of making the order. (Id.)
3. **CUSTODY OF CHILDREN—PETITION FOR MODIFICATION OF DECREE—REFUSAL OF CONTINUANCE—ABSENCE OF SHOWING.**—Upon the hearing of a verified petition to modify a decree of divorce which awarded the custody of the children to the mother, so as to award the same to the father, on the ground of the mother's alleged unfitness and immoral conduct, an application by her counsel for a continuance based merely on the certificate of a physician as to her illness, without any denial of the averments of the petition, or any affidavit or professional statement that she would testify contrary to its averments, or that her presence at the hearing was necessary, was properly refused. (Queirolo v. Queirolo, 686.)

DIVORCE (Continued).

4. **SUPPORT OF MODIFICATION—EVIDENCE OF IMMORAL CONDUCT.**—Testimony in support of the allegations of the petition by witnesses who were in a position to know the character of the house in which the defendant was residing with the children that it was notoriously disreputable, that she was illicitly cohabiting therein with another man, and that the place and its surroundings were unfit for the children, sufficiently warrants the court in modifying the decree by taking the children from the custody of the mother and awarding them to the custody of the father. (Id.)
5. **ADMISSION OF COUNSEL IN OPEN COURT—REVIEW UPON APPEAL—ABSENCE OF RULING AND EXCEPTION—APPELLANT NOT INJURED.**—The admission of the counsel for the defendant in open court as to the immoral conduct of the defendant, even if it be conceded in excess of the authority given him by section 283 of the Code of Civil Procedure, cannot be made a ground of reversal upon appeal of the defendant, where it appears that no ruling was made by the court, and no objection was made or exception taken, in respect to the consideration of the admission by the court, and where the evidence was such as clearly to show that the defendant was not injured by the admission, if it be conceded to be error. (Id.)
6. **CONTRACT FOR CONTINGENT FEE AGAINST PUBLIC POLICY.**—A contract between an attorney and the plaintiff in a divorce suit for a contingent fee is against the policy of the law, and contrary to good morals. The law does not favor divorce; and any collateral bargaining promotive of it is unlawful and void, whether made by the parties with each other, or by one of the parties with an attorney whose benefit depends upon procuring the divorce. (Newman v. Freitas, 283.)
7. **REASON OF RULE AS TO CONTINGENT FEES—CESSATION OF RULE IN DIVORCE CASES—POWER OF COURT.**—The reason of the rule allowing attorneys to contract for contingent fees in civil cases, for the protection of persons unable to pay a certain fee for a meritorious cause of action or defense, does not apply to contracts with the wife in a divorce suit, in which the court may require the husband to pay the wife's expense for prosecuting or defending the action. The reason or necessity for the rule ceasing in such cases, the rule itself also ceases therein. (Id.)

See Specific Performance.

EASEMENT. See Water and Water Rights, 2.

EJECTMENT. See Evidence, 1; Injunction, 1, 2; Mines and Mining, 8.

ELECTION.

CONSTITUTIONAL LAW—PRIMARY ELECTIONS.—The additions made to the Political Code by the act approved March 3, 1899 (Stats. 1899,

ELECTION (Continued).

p. 47), constituting what is known as the "primary election law," are in violation of the bill of rights embodied in article I of the constitution of California, and of fundamental reserved rights growing out of the nature of free government, in that they prohibit the election of delegates to a convention of any political party not representing three per cent of the votes cast at the last election, and take away the rights of self-control and self-preservation from a political party, and allow members of any other party, or of no party, to vote for delegates to the party convention. (*Britton v. Board of Election Commrs., etc.*, 337.)

See *Office and Officers*, 7-10.

EMINENT DOMAIN.

1. **POWER OF RAILROAD UNDER STATUTE—TRESPASS.**—A railroad corporation cannot, under sanction of the statute relating to eminent domain, enter upon lands and construct its road, before commencing condemnation proceedings; and, if it does so, it becomes a trespasser, and the ordinary common-law remedies are open to the owner. (*Robinson v. Southern California Ry. Co.*, 8.)

2. **CONSTRUCTION OF RAILROAD WITHOUT CONDEMNATION—ACTION FOR TRESPASS—STATUTE OF LIMITATIONS.**—An action to recover damages for a wrongful entry by a railroad company upon the land of plaintiff, and the construction of its railroad thereupon, without proceedings for condemnation, and without plaintiff's consent, if commenced more than three years after the road was built and operated, is barred by subdivision 2 of section 338 of the Code of Civil Procedure. (*Id.*)

3. **IMPLIED PERMISSION—LIMITATION OF TWO YEARS.**—If the entry and occupation by the railroad company are lawful by reason of an implied permission by the owner of the land, and not by grant or donation, nor under a statutory right of condemnation, an action for compensatory damages would be barred within the two years' limitation of subdivision 1 of section 339 of the Code of Civil Procedure, applicable to contracts not in writing. (*Id.*)

See *Streets, Roads, and Highways*, 1-4.

EQUITY. See *Estates of Deceased Persons*, 6-8, 25-28; *Injunction*; *Receiver*; *Reformation*; *Specific Performance*.

ESTATES OF DECEASED PERSONS.

1. **FAMILY ALLOWANCE FOR PAST YEARS—SALE OF REALTY—SUPPRESSIO VERI—ACTION BY HOLDER OF MORTGAGES—EQUITABLE RELIEF.**—In a proceeding in equity brought by the holder of mortgages upon the interest of the widow in the estate of her deceased husband, given to secure money advanced for the support of the widow, to

ESTATES OF DECEASED PERSONS (Continued).

set aside a subsequent order granting her a family allowance which appears to have been made entirely out of the ordinary course, in the sum of thirty thousand dollars, to cover past maintenance for nineteen years, upon an application of the widow in which the facts as to the unpaid mortgages were suppressed from the court of probate), and to set aside an order of sale of realty to pay such allowance, and for a general relief, the court of equity, upon findings of the facts, may direct as equitable relief that the proceeds of the sale made under the direction of the court of probate to pay the allowance, shall be applied first toward the payment and satisfaction of the mortgages, before any payment is to be made to the widow. (Curtis v. Schell, 208.)

2. **RIGHT OF TRANSFEREE—PRESUMPTION OF KNOWLEDGE OF LAW—NOTICE—UNUSUAL PROCEDURE.**—One to whom the title of an heir of the estate is transferred or mortgaged as a rule takes only so much of the distributive share of such heir as remains after the purposes and objects of administration have been satisfied, and is presumed to know the law, but is not presumed to anticipate or have notice of any unusual or extraordinary proceeding taken under the form or guise of law. (Id.)
3. **MORTGAGEES NOT CHARGEABLE WITH NOTICE OF UNUSUAL APPLICATION.**—The mortgagees of the widow, who advanced money to support the family, are not chargeable with notice of the subsequent unusual application by the widow for a family allowance made to cover many past years, after the estate is ready for distribution and the children had ceased to be a charge upon the widow, and for a sale of the realty to pay such allowance. (Id.)
4. **SUPPRESSION OF MATERIAL FACTS—FRAUD UPON HOLDER OF MORTGAGES.**—The failure of the widow in her application for a family allowance to notify the court of the existence and nonpayment of the mortgages for money borrowed for the support of the family was the suppression of a material fact, which operated as a fraud upon the holder of the mortgages. To give the widow, under the name of a family allowance, the proceeds of a sale of the same property on which she had borrowed money to support the family, would be to pervert the law designed for a beneficent purpose into an instrument for the perpetration of a gross fraud. (Id.)
5. **FRAUD UPON COURT EXTRINSIC TO APPLICATION.**—The suppression of such material facts was also a fraud committed upon the court in a matter extrinsic and collateral to the question examined on the application for a family allowance, against which equity will relieve. (Id.)
6. **JURISDICTION OF EQUITY TO RELIEVE FROM FRAUD IN COURT OF PROBATE.**—The court of probate is of special and limited jurisdiction,

ESTATES OF DECEASED PERSONS (Continued).

and has not the requisite machinery to try a question of fraud committed therein against the rights of interested parties; and it is the peculiar province of a court of equity to grant relief from such fraud at the instance of the aggrieved parties, who have no adequate remedy in the court of probate. (Id.)

7. **FINALITY OF ORDERS OF PROBATE COURT—CONTROL IN EQUITY OF PROCEEDS OF SALE.**—Where the orders of the court of probate authorizing the family allowance, and directing the sale of the real estate have become final, in the exercise of the probate jurisdiction, and there is no remedy therefor by appeal, equity will give adequate relief against the enforcement of the final judgment of the probate court which was procured by fraud of the widow, by directing a proper application of the proceeds of the sale made thereunder in payment of the mortgages made by her. (Id.)
8. **JURISDICTION OF COURT OF PROBATE—RIGHTS OF STRANGERS.**—It is not within the jurisdiction of the court of probate to determine the rights of strangers to the estate, or to bring them in for the purpose of determining their rights to the proceeds of a sale made under its order for the benefit of the applicant therefor; and for the want of such jurisdiction, the equity jurisdiction is properly invoked to determine their rights to such proceeds. (Id.)
9. **VERIFICATION OF CLAIMS.**—A substantial compliance with the requirements of the statute respecting the verification of claims against estates of deceased persons is sufficient. (Griffith v. Lewin, 596.)
10. **RECITALS OF INDEBTEDNESS IN AFFIDAVIT.**—Where a claim against the estate of a deceased person contains a copy of the promissory note on which it is founded, and states that no part thereof has been paid, except a specified amount, and that a specified balance is due for principal and interest to a given date, an affidavit thereto reciting that such balance is justly due to the claimant up to such date, that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of the affiant, is a sufficient compliance with the statute, although the date of the verification is subsequent to the date to which such balance referred. (Id.)
11. **DEATH OF DEFENDANT PENDING SUIT—PRESENTATION OF CLAIM—REVIVAL OF SUIT AGAINST EXECUTORS—LIMITATION OF THREE MONTHS—CONSTRUCTION OF CODE.**—Where the defendant in an action dies pending suit, all that is required of the plaintiff is the presentation of the claim within the time limited therefor. Section 1498 of the Code of Civil Procedure, limiting the commencement of an action upon a rejected claim which is past due to the period of three months, has no application to an action already pending; and the

ESTATES OF DECEASED PERSONS (Continued).

fact that the suit may have been revived against the executors more than three months after the rejection of the claim cannot affect the cause of action. (*Gregory v. Clabrough*, 475.)

12. **CLAIMS AGAINST ESTATE—NONACTION OF EXECUTOR OR ADMINISTRATOR—OPTION OF CREDITOR.**—Where an executor or administrator takes no action upon a claim, neither approving nor rejecting it, the creditor may exercise his option to regard it as rejected only at the time of or shortly before the bringing of a suit thereupon. (*Id.*)
13. **SALE OF REAL ESTATE—BEST INTEREST OF ESTATE—CONSTITUTIONAL LAW.**—Section 1536 of the Code of Civil Procedure, providing that "when it appears to the satisfaction of the court that it is for the advantage, benefit, and best interest of the estate and those interested therein that the real estate, or some part thereof, be sold, the executor or administrator may sell any real as well as personal property of the state upon the order of the court" is constitutional and valid. (*Estate of Porter*, 86.)
14. **RIGHTS OF HEIRS—EFFECT OF PREVIOUS STATUTE.**—The rights of the heirs of an intestate are controlled by a statute in force at the time of the death of the intestate, regulating the administration of the estate or the sale of its property. (*Id.*)
15. **SETTLEMENT OF FINAL ACCOUNT—PETITION FOR DISTRIBUTION—CONTEST OF HEIRSHIP.**—Where the final account of an administrator has been settled, one claiming to be an heir of the estate may file a petition for distribution, and the court may thereupon determine a contest of heirship and order distribution to the person or persons found to be entitled to the same. (*Estate of Sheid*, 172.)
16. **SUPPLEMENTAL STATEMENT OF ADMINISTRATOR.**—The supplemental statement required to be made by the administrator after the settlement of his final account under section 1665 of the Code of Civil Procedure, and to be filed at the hearing of the petition for distribution, is not a final account which needs to be filed, settled, and allowed before the filing of the petition for distribution. (*Id.*)
17. **MISNUMBERING OF PROCEEDINGS BY CLERK.**—There is but one estate of a deceased person, and the mere fact that the clerk indorses different numbers upon the petition for distribution, and upon the statement of account and decree of distribution, is immaterial. They all belong to the settlement of one and the same estate. (*Id.*)
18. **PENDENCY OF CONTEST UNDER SECTION 1664—PETITION FOR DISTRIBUTION—ABATEMENT—JURISDICTION.**—The pendency of an undetermined contest of heirship under section 1664 of the Code of Civil Procedure does not deprive the court of jurisdiction to determine

ESTATES OF DECEASED PERSONS (Continued).

the heirship upon a petition for final distribution of the estate; and such pendency is not a proper ground for abatement of such petition. (Id.)

19. **DISTRIBUTION TO SURVIVORS OF A CLASS—MATERIAL ISSUE—INTENTION OF TESTATRIX—CONSTRUCTION OF WILL—UNCERTAINTY—PAROL EVIDENCE.**—Where a will devised and bequeathed the residue of the estate to three nephews of the testatrix, described merely as nephews, one of whom died before the death of the testatrix leaving no lineal descendants, and the petition of the survivors for distribution of the whole residue to them alleged that the three nephews were the only children of a sister of the testatrix, and that it was her intention to devise and bequeath such residue to them as a class of such children who should be living at the death of the testatrix, issue joined upon such allegation raised a material issue of fact, and the will is sufficiently uncertain upon its face to admit parol evidence upon that issue to show the circumstances of the case, exclusive of the oral declarations of the testatrix, under section 1318 of the Civil Code. (Estate of Langdon, 451.)
20. **FINDING OF FACT—SUPPORT OF DECREE—CONCLUSIVENESS UPON APPEAL.**—A finding of fact, made in view of the evidence of the circumstances of the case, that the testatrix intended to devise and bequeath the residue of her estate to the three nephews as a class is sufficient to sustain a decree distributing the residue of the estate to the surviving nephews; and such finding is conclusive upon appeal if it is not assailed as contrary to the evidence and the evidence is not disclosed in the record upon appeal. (Id.)
21. **DEFECTIVE DECREE—OMISSION OF SMALL LEGACIES—ORDER FOR CORRECTION—COSTS UPON APPEAL.**—A defect in the decree of distribution in failing to contain a provision for the payment of small legacies, of five dollars each, will be ordered corrected in that respect by the trial court, without costs to the appellant. (Id.)
22. **SETTLEMENT AND DISTRIBUTION—EXCLUSIVE PROBATE JURISDICTION OF SUPERIOR COURT.**—The superior court which has charge of the administration of the estate of a deceased person has exclusive jurisdiction as a court of probate over all questions relating to the settlement and distribution of the estate. (Toland v. Earl, 148.)
23. **DERAIGNMENT OF TITLE TO ESTATE—DECREE OF DISTRIBUTION.**—Under our probate system all deraignment of title to the property of deceased persons, whether dying testate or intestate, is through the decree of distribution entered as the final act in the administration of the estate. (Id.)
24. **CONCLUSIVENESS OF DECREE.**—The law of an estate distributed under a will is the decree of distribution and not the will, and the decree of distribution is conclusive upon the whole world. (Id.)

ESTATES OF DECEASED PERSONS (Continued).

25. **INSTRUCTION BY COURT OF EQUITY.**—The superior court, sitting as a court of equity, has no jurisdiction of an action brought pending the administration of an estate to instruct the court having probate jurisdiction thereof, as to what distribution of the estate should be made under the will, after the administration has been completed. (Id.)
26. **ACTION IN EQUITY TO CONSTRU E WILL—LEGAL QUESTIONS—TRUSTS—PROVINCE OF SUPERIOR COURT SETTLING ESTATE.**—An independent action in equity does not lie in this state to construe a will, whether it involves merely legal questions, or questions relating to the execution of trusts created by the will. It is the province of the superior court which settles the estate of a deceased person to construe the will and the trusts created thereby; and it may exercise all equity powers necessary for a complete administration of the estate, though not authorized in the limited exercise of its probate jurisdiction to determine controversies not within the scope of such administration. (Id.)
27. **EQUITABLE ACTION IN SAME COURT HAVING PROBATE JURISDICTION—DISMISSAL—VOID JUDGMENT.**—An action in equity brought in the same court which has probate jurisdiction over the estate, to obtain from that court sitting in equity a construction of the will for the same court sitting in probate, cannot be entertained, and must be dismissed. Any judgment rendered therein would be void. (Id.)
28. **CASES DISTINGUISHED—CHANGE OF CONSTITUTION.**—Cases for the construction of wills of trusts thereunder arising under the former constitution, which vested all equity jurisdiction in the district courts, and established separate probate courts, are inapplicable to the present system established under the new constitution, which vests both equity and probate jurisdiction in the superior court. One judge of the superior court sitting in equity cannot control another sitting in probate. (Id.)
29. **ORDER VACATING DECREE OF SETTLEMENT AND DISTRIBUTION—JURISDICTION.**—The superior court has jurisdiction, upon application of minor heirs made within the time limited by section 473 of the Code of Civil Procedure, to vacate and set aside an order and decree settling the final account of the administrator, and distributing the estate, on account of their "mistake, inadvertence, surprise, or excusable neglect," and may require a new settlement of the final account, and a new decree of distribution. (Estate of Hickey, 14.)
30. **NONAPPEARABLE ORDER—OBJECTIONS NOT AVAILABLE.**—The order vacating the former order and decree is not appealable; and objections to its validity, going only to the sufficiency of the showing, and not to the jurisdiction of the court to make the order, cannot be available as a ground for assailing the validity of the new set-

ESTATES OF DECEASED PERSONS (Continued).

tlement of the final accounts of the administrator, and of the new decree of distribution, which are not otherwise incorrect. (Id.)

31. **DECREE OF DISTRIBUTION—EXECUTION—JURISDICTION OF COURT OVER ADMINISTRATOR.**—A decree of distribution of the estate of a deceased person is an adjudication only of the rights of the distributees in regard to the proportions or parts of the estate to which each is entitled, and cannot be executed by any form of process. It is simply evidence of title, and not a judgment that the heir or legatee recover money or other property from the administrator. The administrator is an officer of the court, subject to its jurisdiction until final discharge, and may be compelled by the court to perform his duty. The court discharges him from his trust only when his duty has been fully performed. (Estate of Kennedy, 384.)

See Appeal, 22, 23; Sale, 17-19.

ESTOPPEL.

1. **ESTOPPEL OF FORMER JUDGMENT—IDENTITY OF QUESTIONS.**—In order that a judgment in one action may constitute an estoppel against the parties thereto in a subsequent action, it must be made to appear, with certainty to every intent, either upon the face of the record or by extrinsic evidence, that the identical questions involved in the issues to be tried were determined in the former action. What was involved must not be left to any uncertainty or conjecture; and that only is deemed to have been adjudged in the former action which appears upon the face of the record to have been so adjudged, or which was actually and necessarily included therein, or necessary thereto. (Beronio v. Ventura County Lumber Co., 232.)
2. **PLEA OF WANT OF CONSIDERATION—ESTOPPEL—DISPUTABLE PRESUMPTION.**—When want of consideration of a stay bond is pleaded, there can be no estoppel of the sureties that can interfere with that defense. The presumption of consideration attaching to a written instrument is a disputable presumption, which may be overcome by evidence of facts showing a want of consideration. (Estate of Kennedy, 384.)

See Bonds, 1; Contract, 5; Judge, 1; Mines and Mining, 6; Mortgage, 14.

EVIDENCE.

1. **EJECTMENT—DERAIGNMENT OF TITLE FROM DEFENDANT UNDER EXECUTION.**—In an action of ejectment, where the plaintiff had proved title in the defendant, and offered proof of a deraignment of title from him by levy, sale, and sheriff's deed under execution issued upon a money judgment against him, it is error to exclude such evidence, regardless of the question whether or not the defendant can overcome that evidence by proof of other facts. (Robinson v. Thornton, 12.)

EVIDENCE (Continued).

2. **ACTION BY ATTORNEY FOR SERVICES—CROSS-EXAMINATION OF PLAINTIFF.**—In an action by an attorney for services rendered to the defendant, where the plaintiff had given no testimony in chief upon the first count of his complaint, the defendant may properly be refused the privilege of cross-examination thereupon, in reference to matters not appearing to be material to the case. (*Coonan v. Loewenthal*, 197.)
3. **ADMISSION OF DOCUMENTARY EVIDENCE—PREJUDICE NOT SHOWN IN RECORD.**—Evidence of a contract between the defendant and trustees for his creditors, admitted for the plaintiff, is not shown to be prejudicial where the contract is not set out in the record nor its contents or materiality shown therein. (*Id.*)
4. **VALUE OF SERVICES—EXPERT EVIDENCE—BASIS FOR HYPOTHETICAL QUESTIONS—QUESTION FOR JURY.**—Expert evidence of attorneys as to the value of the professional services rendered by the plaintiff as attorney for the defendant may be properly admitted in answer to hypothetical questions based upon the admitted allegations of the complaint, and the evidence given for the plaintiff. Whether the evidence for the plaintiff is true is a question for the jury to determine. (*Id.*)
5. **HARMLESS ERROR.**—Erroneous rulings upon evidence, which appear from the record not to have materially injured the appellant, are not ground for reversal. (*Hudson v. Hudson*, 141.)
 See Appeal, 1-5, 8; Bona Fide Purchaser, 1; Bonds, 2, 3; Broker, 1, 4; Criminal Law, 4, 6, 7, 10, 13-15, 21, 23, 25, 28, 33-39, 42, 43, 47; Estates of Deceased Persons, 19; Husband and Wife, 2-6; Landlord and Tenant; License, 2; Mechanics' Liens, 8; Negligence; Negotiable Instruments, 2; New Trial, 1-3; Office and Officers, 12, 13; Partnership, 6; Sale, 7; Street Assessment, 11; Streets, Roads, and Highways, 5-10; Writ of Assistance.

EXECUTION. See Evidence, 1; Partnership, 13; Writ of Assistance.

EXECUTORS AND ADMINISTRATORS. See Estates of Deceased Persons.

FINDINGS.

1. **SUPPORT OF JUDGMENT—INDECISIVE REFERENCE TO PLEADINGS.**—Where the answer contains both denials and affirmative allegations of matter of defense, findings that all of the allegations of the complaint are true, and that all of the allegations of the answer, so far as they are consistent with the allegations of the complaint, are not true, cannot support a judgment for the plaintiff. Such findings leave it undecided what allegations of the answer are inconsistent with the allegations of the complaint. (*Krug v. F. A. Lux Dyeing Co.*, 322.)

FINDINGS (Continued).

2. **DUTY OF LOWER COURT—FINDINGS NOT MADE UPON APPEAL.**—It is the duty of the lower court to make its findings certain and decisive; and this court will not assume the function of determining for the first time upon appeal what allegations are true or false, either by reference to the testimony or by reference to other facts found. (Id.)
3. **IMMATERIAL VARIANCE—JUDGMENT.**—Where the findings of fact are full and explicit, a judgment entered thereon in favor of an intervenor will not be reversed merely because in the conclusions of law the word "plaintiff" is inadvertently used for "intervenor." (Field v. Burr, 44.)
4. **UNNECESSARY FINDINGS—ADMISSIONS IN PLEADINGS.**—Undenied allegations of the complaint require no findings; but it is not error to make such findings, and it cannot be assumed that such findings were purposely made burdensome upon the appellant. (Higgins v. San Diego Savings Bank, 184.)
 See Appeal, 4, 5, 8; Assignment, 2, 3; Bona Fide Purchaser; Bonds, 3; Corporations, 2, 3; Estates of Deceased Persons, 20; Landlord and Tenant, 1; Master and Servant, 4; Municipal Corporations, 4; Negligence, 1; Pleading, 8; Public Lands, 4.

FINE. See Franchise, 2.

FORFEITURE. See Insurance, 2, 3.

FRANCHISE.

1. **USURPATION OF FRANCHISE—CIVIL ACTION—PENAL JUDGMENT.**—An action for the usurpation of a franchise, based on section 803 of the Code of Civil Procedure, is in the form of a civil action, and as to the procedure therein follows the rules prescribed for civil cases, but the judgment rendered therein adjudging the defendant guilty of usurping the franchise, and imposing a fine therefor pursuant to section 809 of that code, is penal in its nature. (People ex rel. Warfield v. Sutter Street Ry. Co., 545.)
2. **INTEREST ON FINE NOT ALLOWED.**—The same rule as to interest on the fine imposed in such action should govern as applies to a judgment for a fine in any criminal case, and no interest can be allowed thereupon. The judgment does not come within the terms of sections 1915 and 1920 of the Civil Code. (Id.)
 See Municipal Corporations; Street Railroad; Water and Water Rights, 8.

FRAUD.

1. **LIFE INSURANCE—SETTLEMENT OF DISPUTED POLICY—REPUDIATION FOR FRAUD—ACTION FOR RESIDUE—CONTRACT—TRUST.**—An action by the executors of the will of a deceased person to recover the residue of a policy of life insurance, a dispute concerning which had been settled for a little over one-fourth of the policy, in which

FRAUD (Continued).

the complaint avers that plaintiff, before bringing the action, notified defendant that the "repudiated said settlement upon the ground that it was procured by fraud," consisting of certain false representations, and demanded payment of the residue of the policy, must be regarded as founded upon the policy as a subsisting contract, and cannot be considered as an action in tort for damages for deceit for the fraud charged. (*Westerfeld v. New York Life Ins. Co.*, 68.)

2. **SETTLEMENT AND RELEASE NOT VOID—RESCISSION.**—The action cannot be sustained upon the theory that the settlement and release can be treated as void for the alleged fraud. This is contrary to the rule of our statute, which provides in section 1566 of the Civil Code that a consent to a contract procured by fraud "is nevertheless not absolutely void, but may be rescinded by the parties in the manner prescribed by the chapter on rescission." (*Id.*)
3. **ELECTION OF REMEDY—RESCISSION—DAMAGES.**—One who has been defrauded by a contract of settlement may elect either to rescind and restore what he received, and recover what he was induced to part with, or affirm the contract and sue for damages for the fraud. But he cannot have both remedies; and, if there has been a rescission, an action for damages cannot be sustained. (*Id.*)
4. **SETTLEMENT OF DISPUTED CONTRACT—DAMAGES FOR FRAUD.**—Where a disputed claim under a contract is settled by the parties thereto, the measure of damages for fraud in inducing the settlement is not necessarily the extinguished balance of the claim, but indemnity for the real loss sustained, in view of the uncertainties and expense of expected litigation, unless for special reasons exemplary damages may be awarded. The indemnity merely may be much less than the contract balance. (*Id.*)
5. **RESTITUTION UPON RESCISSION—OFFER BEFORE SUIT.**—Where money is received upon the settlement of a disputed claim, and it cannot be affirmed beforehand with certainty that, as the result of litigation, the plaintiff would surcly be entitled to recover as much as or more than he received upon the settlement, the restitution of what he received upon rescission of the contract for fraud, and the offer of such restitution before suit brought, is a necessary condition precedent to maintaining an action upon the original demand. (*Id.*)
6. **RIGHT OF ACTION—BAR OF EXISTING COMPROMISE.**—A right of action must exist in the plaintiff when the action is commenced, and, where there is then an unrescinded existing compromise, it is binding when the suit is commenced, and is a bar thereto, which is not removed by verdict or judgment. (*Id.*)
7. **VARIANCE—OBJECTIONS—EXCEPTIONS—MOTION FOR NONSUIT.**—If it were permissible to allow a judgment for the plaintiff for the

FRAUD (Continued).

full amount of the policy to stand upon a theory of the complaint which is at variance with its allegations, for the reason that it may be substantially just, such judgment cannot be permitted to stand, when the allegations made are not sustained, and objections were raised and exceptions taken to the rulings of the court throughout the case, and a motion for a nonsuit was made upon that ground, and erroneously denied. (Id.)

8. **REPRESENTATIONS NOT FRAUDULENT.**—Representations that the policy in question was never delivered to the decedent, and that it was merely submitted to him for examination to be finally delivered if he approved of it and paid the premium, which he did not do, are not fraudulent, where the testimony shows that there was no binding delivery of the policy, as an executed contract, and that the deceased did not accept it as delivered, and did not indicate that he was satisfied with it, and did not pay the premium. (Id.)

9. **UNAUTHORIZED AGREEMENT OF LOCAL AGENT—CASH SURRENDER VALUE OF OLD POLICY—CONCEALMENT BY COMPANY NOT FRAUDULENT.**—An unauthorized agreement between a local agent and the deceased that the cash surrender value of an old policy, which the deceased had before expressly refused to keep up, and which, according to its terms, then had no surrender value, and could not be modified by any other officer that the president, vice-president, or actuary of the company, should be applied toward payment of premiums on the new policy, the amount thereof to be ascertained by the company, cannot bind the company to allow any surrender value, or estop it from insisting on the terms of the new policy as to payment of first premium; and a concealment by the company of such unauthorized agreement at the time of the settlement of the policy with the executors of the deceased was not fraudulent. (Id.)

See Corporations, 3; Estates of Deceased Persons, 4-6; Mortgage, 13; Sale, 10; Vendor and Vendee.

GUARANTY.

1. **LIABILITY OF GUARANTOR—MODIFICATION OF ORIGINAL CONTRACT—CONSENT OF GUARANTOR.**—Although a guarantor is released from liability where the original contract is modified without his consent, he is not so released where modifications are consented to by him. (Pacific Press Pub. Co. v. Loofbourow, 24.)

2. **APPLICABILITY OF GUARANTY—EFFECT OF CONSENT.**—Where the consent of the guarantor to any modification of the original contract exists, it is not necessary that the original guaranty should be changed or made expressly applicable to the modified contract; and it is immaterial whether the modification consented to was a benefit or disadvantageous to the guarantor. (Id.)

SETTLEMENT OF TEMPORARY DIFFICULTY.—Where there was no actual breach of the contract on the part of the person to whom the

GUARANTY (Continued).

guaranty was given, the fact that a temporary difficulty existed between the original parties to the contract is immaterial, if the settlement of it led to a modification of the contract, which was consented to by the guarantors. (Id.)

See Bonds, 1; Contract, 17.

GUARDIAN AND WARD.

1. **NOTE FOR MONEY BORROWED BY PREVIOUS GUARDIAN—NONAPPROVAL OF COURT.**—The note of a new guardian given for money borrowed for the support and care of the ward by a previous guardian, which is not approved by the court having jurisdiction of the estate, cannot bind the ward. (Wright v. Perry, 614.)
2. **NONLIABILITY OF GUARDIAN—WANT OF CONSIDERATION.**—The new guardian, never having received any consideration for the note, cannot be held personally liable thereupon. (Id.)
3. **DEBT FOR SUPPORT AND CARE OF WARD—PRESUMPTION AGAINST PAYMENT BY NOTE—STATUTE OF LIMITATIONS.**—The note cannot be presumed to be in payment of the original debt of the estate of the ward for money borrowed for the ward's necessary support and care. But where it appears that such original indebtedness is barred by the statute of limitations, and that statute is pleaded by the ward, the debt can neither sustain an action against the ward upon the unratified note in suit nor any possible recovery against the ward. (Id.)
4. **NONRATIFICATION OF NOTE BY WARD.**—The ward, not having received any benefit from the note sued upon, and never having been in any manner originally liable thereupon, cannot be subject to an action based thereupon, in the absence of proof that it was directly ratified and agreed to be paid by the ward after attaining majority. In such case it is not necessary for the ward to disavow liability upon the note after attaining majority. (Id.)
5. **ADMISSION OF PLEADING—RECEPTION OF BENEFIT BY WARD.**—An admission in the answer by failure of the ward to deny the reception of the benefit of the money borrowed for the ward's support during minority, whatever effect it might have in an action for necessities supplied to the ward, cannot amount to a ratification of the subsequent note sued upon. (Id.)
6. **ORAL AGREEMENT OF DEFENDANTS.**—An oral agreement of the defendants that if recovery should be had against both defendants on the note sued upon the one who signed it as guardian would pay it does not show a ratification of the note by the ward. (Id.)

HABEAS CORPUS. See Criminal Law, 44-46.

HIGH SCHOOLS. See Schools.

HOMESTEAD.

BUSINESS AND HOTEL PROPERTY—CONVEYANCE BY HUSBAND—SUBSEQUENT JOINT MORTGAGE.—No valid homestead claim can be made upon premises used for a general merchandise store and hotel, though the family may reside in such hotel; and a conveyance made by the husband alone of such premises which were his separate property, after a declaration of homestead had been filed by him thereupon, passed title to the grantee, and plaintiff's claiming under such conveyance duly recorded hold the title free from the encumbrance of a subsequent mortgage executed jointly by the husband and wife, and from any title derived thereunder by the defendant through a sheriff's deed under foreclosure of such mortgage. (*Beronio v. Ventura County Lumber Co.*, 232.)

HUSBAND AND WIFE.

1. **LIABILITY OF HUSBAND FOR NECESSARIES—ABANDONMENT OF INSANE WIFE.**—A husband who took his insane wife from the custody of an incorporated institution for the care of the insane, in which he had placed her, and shortly thereafter left her, deserted and destitute, in another state, with the presumed intention that her identity should be lost, and that she might no longer be a charge upon him, is liable, as upon an implied request, for necessities thereafter furnished to her by the same institution, to whose custody she was returned, by an officer of the law, though he may have had no knowledge that she was thereafter kept and provided for therein. (*St. Vincent's Inst. for Insane v. Davis*, 20.)
2. **NOTICE BY LETTER—EVIDENCE—COPY—PRESUMPTION FROM MAILING.**—A copy of a letter addressed to the husband, defendant, by the president of the corporation plaintiff, proved by its secretary to have been a copy of an original, addressed to the defendant and mailed to him at his address, which is presumed from the facts to have been known in the institution, and which contained a notice of the return of his wife to the institution by an officer of the law, is admissible if not specifically objected to as being a mere copy of the original letter; and the original, of which it was a copy, having been proved to have been properly addressed and mailed to the defendant, it is presumed that he received it. (*Id.*)
3. **DEPOSITIONS TAKEN OUT OF STATE—READING AND CORRECTION BY WITNESS—CONSTRUCTION OF CODE.**—Section 2032 of the Code of Civil Procedure, requiring the certificate to a deposition to state that the deposition, when completed, was read over to the witness and corrected by the witness if so desired, applies only to depositions taken in this state, and not to depositions taken out of the state. (*Id.*)
4. **ACTION FOR CARE OF INSANE WIFE—DEMAND OF CUSTODY BY HUSBAND—GOOD FAITH—BURDEN OF PROOF—SUPPORT OF FINDING.**—In an action by a foreign corporation to recover for the care of the in-

HUSBAND AND WIFE (Continued.)

sane wife of the defendant, residing in this state, the burden of proof is upon the plaintiff to show that a demand made upon the plaintiff by the defendant, at its institution in St. Louis, for the delivery to him of the custody of his wife, was not made in good faith; and a finding in favor of such good faith is supported if there is any evidence tending to show it, notwithstanding suspicion cast by plaintiff upon the defendant's motives. (*St. Vincent's Inst. for Insane v. Davis*, 17.)

5. **PROOF OF NEGLECT OF HUSBAND REQUIRED.**—An action cannot be maintained for necessities supplied to the wife of the defendant, unless a showing is made of the neglect of the husband to provide such necessities. (*Id.*)
6. **EVIDENCE—RECOVERY OF FORMER JUDGMENT FOR PREVIOUS CARE—HARMLESS EXCLUSION.**—The exclusion from evidence of a judgment-roll in a former action by the same plaintiff against the same defendant, in the circuit court of the United States, showing a recovery by the plaintiff for former care of the insane wife of the defendant, prior to and not including any of the care involved in the present action, cannot be productive of any injury to the plaintiff. (*Id.*)

See Divorce; Homestead.

INJUNCTION.

1. **EJECTMENT FOR MINING CLAIM—INJUNCTION AGAINST WASTE—DISCRETION OF COURT—AFFIDAVITS ON MOTION TO DISSOLVE.**—In an action of ejectment to recover possession of a mining claim, where the verified complaint is sufficient to support a preliminary injunction to prevent waste of the mine pending suit, the court may grant such injunction, and has discretion to maintain it, notwithstanding affidavits of the defendants on motion to dissolve the injunction may deny the equities of plaintiff's case, and show a case of hardship upon the defendant. (*Williams v. Long*, 229.)
2. **IMPROPER RESTRAINT OF DEFENDANTS.**—An injunction in an action of ejectment cannot properly restrain the defendants from "entering upon" the land sued for, or from "in any manner trespassing thereupon," or from "working thereon," provided no waste is committed. In all other respects than extracting or removing ore from the mine or committing waste, the defendants are entitled to use the mine pending the suit as their occasion may demand. (*Id.*)
3. **APPEAL FROM ORDER REFUSING TO DISSOLVE INJUNCTION—MERITS OF CASE NOT INVOLVED.**—Upon an appeal from an order refusing to dissolve a preliminary injunction to prevent waste by the defendants pending an action of ejectment, the merits of the case, or the right of plaintiff to recover in the action, are not involved, and cannot be considered. (*Id.*)
4. **AMENDED COMPLAINT—AFFIDAVIT—CONSTRUCTION OF CODE.**—Under section 527 of the Code of Civil Procedure, providing that "the

INJUNCTION (Continued).

injunction may be granted at the time of issuing the summons upon the complaint, and at any time afterward before judgment upon affidavits," it cannot be objected that the court was without jurisdiction to grant an injunction upon a verified amended complaint, which is an affidavit. and may be used as such. (Smith v. Stearns Rancho Co., 58.)

5. **WATER RIGHTS—DISTRIBUTION FROM CANAL—INVALID ASSESSMENTS—RESTRAINING INTERFERENCE—PLEADING.**—In an action by the owners of land planted to fruit trees, a complaint showing their right to the distribution and delivery of water from a canal, for necessary irrigation of their trees, which would die without it, and seeking to enjoin the canal company from interfering therewith, which it is alleged they are threatening to do, to plaintiffs' irreparable injury, for nonpayment of assessments for items specified therein, and alleged not to be proper charges for maintaining or repairing the canal, and averring readiness to pay such portion of the assessments as may be found due, sufficiently shows that the damages from the threatened injury would be irreparable, and is not objectionable for not stating the quantity of water owned by the plaintiffs, or for not sufficiently showing the wrongfulness of defendant's claims, or the relative rights of the parties. (Id.)
6. **JOINDER OF PARTIES PLAINTIFF—TENANCY IN COMMON.**—The plaintiffs were entitled to sue together, as being tenants in common of the ditch, notwithstanding their several ownership of lands and of the right of irrigation thereof. (Id.)
7. **GROUND OF INJUNCTION—IMMATERIAL OBJECTIONS.**—Where the grounds of the injunction were that plaintiffs were part owners of the canal, and that defendant threatened to deprive them of the use of it, the other objections urged to the complaint are immaterial. (Id.)
8. **MANDATORY INJUNCTION—RESTRICTIVE FORM.**—An injunction, though restrictive in form, if it has the effect to compel the performance of a substantive act, is mandatory, and necessarily contemplates a change in the relative position or rights of the parties at the time the injunction is granted or the decree entered. (Mark v. Superior Court, 1.)
9. **COMPELLING CHANGE OF TEXT-BOOKS ON PENMANSHIP—MANDATORY AND SUBORDINATE PROHIBITORY FEATURES.**—In an action to determine which of two series of text-books on penmanship has been legally adopted in the public schools of San Francisco, a final injunction prohibiting the members of the board of education from using therein the text-books of the "Shaylor system of vertical round-hand penmanship," and commanding the use therein of the text-books of the "California system of vertical penmanship," is mandatory in its main purpose, and the prohibitory feature thereof

separably connected therewith. (Id.)

10. **APPEAL—STAY OF PROCEEDINGS—PUNISHMENT FOR CONTEMPT—PROHIBITION.**—An appeal from the final judgment in such action suspends and stays the operation of the entire injunction; and an attempt by the superior court, pending such appeal, to punish, as for contempt, a violation of the prohibitory feature of the injunction, is an excess of jurisdiction which will be stayed by writ of prohibition. (Id.)
11. **TAXPAYER—ILLEGAL CLAIM AGAINST COUNTY FOR PRINTING.**—A taxpayer cannot maintain an action to enjoin the board of supervisors from allowing an alleged illegal claim against the county for printing; nor can he in that action enjoin the auditor and treasurer from acting officially upon such claim. (McBride v. Newlin, 36.)
12. **QUASI JUDICIAL ACTION OF SUPERVISORS—PRESUMPTION.**—The board of supervisors, in passing upon a claim against the county, acts in a *quasi* judicial capacity; and it must be presumed that the board will do its duty, and will reject the claim if it is illegal. (Id.)
13. **PLEADING—INSUFFICIENT ALLEGATIONS.**—A complaint to enjoin the allowance and payment of an illegal claim for printing, which does not allege that any claim therefor has been made out or filed with the board of supervisors, or that any such claim will be presented, is fatally defective. (Id.)

See Assignment, 8; Contract, 21, 23; Place of Trial, 1.

INSANE PERSONS.

ESTATE OF INSANE PERSONS—PAYMENT OF ATTORNEY—ORDER VACATING ALLOWANCE—DENIAL OF MOTION FOR REPAYMENT—SILENCE OF ORDER—MANDAMUS.—Where an order vacating the allowance of an attorney's fee out of the estate of an insane person, which had been paid, is silent as to a part of the motion therefor, which moved also for an order requiring the repayment of the fee into the estate, such silence is in legal effect of denial of that part of the motion, and *mandamus* will not lie to compel the judge to act thereupon. (Townsend v. Angellotti, 460.)

See Criminal Law, 44-46; Husband and Wife.

INSOLVENCY.

1. **OPPOSITION OF CREDITOR TO DISCHARGE—SPECIFICATIONS—SEPARATE DEFENSES.**—The specifications of a creditor of an insolvent debtor in opposition to his discharge are in the nature of separate defenses thereto, and any of them which show sufficient ground for the opposition must be answered and found in favor of the debtor to entitle him to his discharge. (Estate of Rich, 404.)
2. **QUALIFIED RULINGS—SUFFICIENT SPECIFICATIONS—UNANSWERED—ERRONEOUS DISMISSAL AND DISCHARGE.**—After qualified rulings

INSOLVENCY (Continued).

striking out part of the specifications of the creditor, and sustaining a demurrer to several others for ambiguity and uncertainty only, where others are left unanswered which set forth fraudulent conduct of the insolvent sufficient to deprive him of the right to a discharge, such unanswered specifications render a dismissal of the opposition for failure of the creditor to amend it after the ruling upon the demurrer for uncertainty, and a consequent discharge of the insolvent, erroneous, and subject to reversal upon appeal. (Id.)

3. **GENERAL AND SPECIAL DEMURRER—FORM OF RULING IMMATERIAL.**—The form of ruling upon a general and special demurrer to the opposition sustaining the special demurrer only to part of the specifications cannot affect the result, whether such ruling be regarded as overruling the general demurrer to the opposition or as failing to pass upon it; as in either case the order dismissing the opposition and granting the discharge, when sufficient specifications were unanswered, is erroneous. (Id.)
4. **INVOLUNTARY INSOLVENCY—JURISDICTION—AMENDED PETITION—INSUFFICIENT VERIFICATION—PAYMENT OF ONE CREDITOR.**—The court obtains jurisdiction of proceedings in involuntary insolvency by virtue of the five original petitioning creditors. An amended petition must be verified by three of the creditors who presented the original petition, and a verification thereof by a new creditor not a party to the original petition is insufficient. Where one of the original creditors has been paid, and only four creditors present a second amended petition, the court has no jurisdiction thereof. (In re Whipple, 426.)

See Building and Loan Association, 2; Receiver, 1.

INSTRUCTIONS. See Criminal Law, 15-24, 30-32, 40, 41; Sale, 5, 6.

INSURANCE.

1. **LIFE INSURANCE—STIPULATIONS IN POLICY FOR PURCHASE WITH NET RESERVE—CONSTRUCTION OF CODE—WAIVER.**—The provisions of section 450 of the Civil Code, requiring every life insurance policy delivered in this state upon the life of a resident thereof to contain certain stipulations specified in that section, in reference to the purchase with the net reserve of a term policy or a paid-up policy, in case of nonpayment of premium after three years' full payment thereof, do not have the effect to make such stipulations part of the policy, as matter of law, if not inserted therein, and, if they are so inserted, they are mere matter of agreement, which may be waived by the consent of the parties. (Rife v. Union Central Life Ins. Co., 455.)
2. **LOAN UPON POLICY—STIPULATION IN NOTE—PROTECTION OF SECURITY—WAIVER OF TERMS OF POLICY—FORFEITURE.**—After payment of more than three years' premiums, where a cash loan was made upon the policy of nearly the full amount of the net reserve, and

INSURANCE (Continued.)

the note given therefor stipulates that if the policy shall at any time thereafter lapse for nonpayment of premium, all provisions in the policy for the issue of a paid-up or a term policy shall become null and void, such stipulation is a reasonable and valid protection of the security of the note, and operates as a waiver of the terms of the policy; and in case of nonpayment of premium thereafter, there is nothing in the laws of the state relative to forfeitures which makes against the enforcement of the condition so agreed upon. (Id.)

3. **LIFE INSURANCE—NONPAYMENT OF PREMIUM—FORFEITURE OF POLICY.**—A policy of life insurance which expressly provides that in case of nonpayment of the stipulated premium at the time fixed therein the policy shall be void, and all payments made thereunder forfeited, ceases to be effective in such case, at the option of the insurance company; and upon the death of the insured with an unpaid installment of premium, which is past due by the terms of the policy, no recovery can be had thereupon. (Methvin v. Fidelity Mutual Life Assn., 25.)
4. **STIPULATED PAY-DAYS MUST CONTROL.**—The pay-days stipulated for in the policy must control, no matter when the policy is delivered, and the advance premium paid. The time of payment fixed in the policy is of the essence of the contract, if a forfeiture is provided for upon nonpayment at the day appointed. Delinquency cannot be tolerated or redeemed, except at the option of the company. (Id.)
5. **DELIVERY OF POLICY AFTER ITS DATE—QUARTERLY PREMIUMS FROM DATE—PAYMENT ON DELIVERY—RECEIPT UNDER POLICY.**—The fact that a policy which provided for an advance payment of a premium for the first quarter of a year from its date, and for each quarter of a year thereafter, was not delivered until more than one month after its date, and that the first payment on the policy was then made and receipted for, though effective for the first quarter, cannot have the effect to extend the operation of the first payment for a period of three months from the delivery of the policy, contrary to the terms of the policy, and contrary to a receipt given for the payment in accordance with those terms. (Id.)
6. **NONPAYMENT FOR SECOND QUARTER—DEATH OF INSURED WITHIN THREE MONTHS FROM FIRST PAYMENT.**—The death of the insured after the lapse of the pay-day for the second quarter provided for in the policy, without payment therefor, as requested by the company, though occurring within three months after payment made for the first quarter, at the time of delivery of the policy, precludes a recovery thereupon. (Id.)
7. **NONPAYMENT OF FIRST PREMIUM—ABSENCE OF LIABILITY.**—An insurance company is not liable upon a policy delivered by a local agent, where the first premium is not only not paid, but there is an

entire absence of liability on account of the premium and the policy holder cannot be compelled to pay it. (*Westerfeld v. New York Life Ins. Co.*, 68.)

See Fraud; Receiver, 1-4.

INTEREST. See Contract, 9; Franchise, 2.

IRRIGATION. See Water and Water Rights.

IRRIGATION DISTRICT.

1. **ACTION TO CANCEL BONDS OF IRRIGATION DISTRICT—STATUTE OF LIMITATIONS—DEMURRER TO COMPLAINT.**—In an action to cancel the bonds of an irrigation district, where any part of the cause of action alleged is not barred by the statute of limitations, a demurrer to the complaint pleading the statute is properly overruled. The statute does not begin to run against such cause of action from the date of the order for the issuance of the bonds, nor from the date of a contract therefor, but only from the date of the delivery of the bonds for a valuable consideration, and as to any bonds delivered within the statute and bonds not issued the cause of action is not barred. (*Sechrist v. Rialto Irr. Dist.*, 640.)
2. **COMPLAINT BY TAXPAYERS—OFFER OF RESTITUTION OF CONSIDERATION OF BONDS—MAXIM OF EQUITY INAPPLICABLE.**—A complaint by persons who are land owners and taxpayers in an irrigation district to cancel the bonds of the district which have been illegally ordered to be issued, and who, in the nature of the case, are unable to restore the consideration received by the district for the issuance of the bonds, need not aver or show an offer of such restitution by the plaintiffs or by the district. In such case, the maxim that "he who seeks equity must do equity" is inapplicable. The cause of action is not one for rescission; and the taxpayers are not required to do equity as a condition of the relief sought. (*Id.*)
3. **EQUITIES OF BONDHOLDERS—SHOWING AT TRIAL—PROTECTION AGAINST DISTRICT.**—If, at the trial, the bondholders should show sufficient equities against the district, assuming that the district and its directors are properly made defendants, such equities may be protected by the court while awarding to the plaintiff the relief sought. (*Id.*)
4. **DEMAND UPON DISTRICT NOT REQUIRED.**—The taxpayers plaintiff are not required to make and demand upon the district to bring the action, and need not aver such demand in their complaint. (*Id.*)
5. **PARTIES—IRRIGATION DISTRICT AND DIRECTORS.**—In order to secure the relief sought of restraining the levy of an assessment to pay the illegal bonds and to restrain the further disposition of unissued

ant; and its directors are proper parties for the purpose of reaching and restraining the corporation. (Id.)

6. **JOINDER OF PLAINTIFFS.**—The taxpayers plaintiff have a sufficient joint interest to be joined as plaintiffs. (Id.)
7. **NONJOINDER OF BONDHOLDERS.**—Where the complaint makes several individuals and private corporations, holders of bonds that have been issued by the district, parties defendant, under allegations that they have no equities as against the district, a demurrer for nonjoinder of other bondholders is properly overruled. The bondholders are proper, but not necessary, parties; and though no decree would bind those not brought in, the court may grant relief as to all who are made parties to the action. (Id.)

JOINT DEBTORS.

1. **JOINT NOTE—BENEFIT FROM CONSIDERATION—PRESUMPTION OF JOINT AND SEVERAL PROMISE—CONSTRUCTION OF CODE.**—Section 1659 of the Civil Code, which provides that “where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several,” cannot be construed to mean that the parties, though receiving some benefit from the consideration, may not create a joint liability upon a note expressly made joint and intended to be joint only, as provided for in section 1430 of the same code. (*Farmers’ Exchange Bank v. Morse*, 239.)
2. **PRESUMPTION, WHEN INAPPLICABLE.**—The presumption of a joint and several promise does not apply where there is an express joint obligation, in the absence of any facts to show a contrary intention. (Id.)
3. **PRESUMPTION OVERCOME—EXPRESS AGREEMENT FOR JOINT NOTE.**—Where parties having several undivided interests in lands covered by several judgments of foreclosure expressly agreed with each other, in consideration of a conveyance of the mortgaged lands to a trustee to be conveyed to them severally in proportion to their interests, upon payment in full, to execute a joint note for the aggregate amount of the judgments, such express agreement overcomes the presumption of a joint and several promise, and the joint promise of such joint note must be enforced according to its terms. (Id.)
4. **ACTION UPON JOINT NOTE—PARTIES.**—In an action upon a joint note upon which there is no several liability, all of the joint makers must be joined as parties defendant. (Id.)

JUDGE.

1. **DISQUALIFICATION OF JUDGE—CONSENT OF PARTIES TO CALL IN QUALIFIED JUDGE—ESTOPPEL.**—Where a disqualified judge calls in a qualified judge from another county, with the consent of both par-

INSURANCE (Continued.)

entire absence of liability on account of the premium and the policy holder cannot be compelled to pay it. (*Westerfeld v. New York Life Ins. Co.*, 68.)

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IRRIGATION DISTRICT (Continued.)

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JUDGE.

1. **DISQUALIFICATION OF JUDGE—CONSENT OF PARTIES TO CALL IN QUALIFIED JUDGE—ESTOPPEL.**—Where a disqualified judge calls in a qualified judge from another county, with the consent of both par-

JUDGE (Continued.)

ties to a cause, for the trial thereof, the parties, after such qualified judge has begun to act in the cause without objection, are estopped from raising the objection that the disqualified judge had no power to select his successor, or to request another judge to sit in the cause. (*City of Oakland v. Hart*, 98.)

2. **JURISDICTION—PROHIBITION.**—The case is not one to which the rule that consent will not confer jurisdiction is applicable; and the judge called in by consent of the parties being qualified to act, prohibition will not lie to prevent him from acting as judge in the cause. (*Id.*)

JUDGMENT. See Appeal, 4, 6-8, 11, 14, 20, 22, 23; Estates of Deceased Persons, 20, 21, 23, 24, 27; Estoppel; Findings, 1, 3; Franchise; License, 2; Malicious Prosecution, 3; Mortgage, 1, 8, 9, 18; Municipal Corporations, 4, 7; Partnership, 12, 14; Practice, 1-3, 9; Streets, Roads, and Highways, 2, 3; Water and Water Rights, 1.

JURISDICTION. See Bill of Exceptions, 1, 2; Estates of Deceased Persons, 6-8, 18, 22, 25-30; Injunction, 10; Insolvency, 4; Judge, 2; Receiver, 1, 2, 14.

JURY AND JURORS. See Criminal Law, 1, 20; Divorce, 2.

LANDLORD AND TENANT.

1. **LANDLORD AND TENANT—ACTION BY LESSEE—WRONGFUL ENTRY OF LESSOR—TERMS OF VERBAL LEASE—SUPPORT OF FINDING.**—In an action by a lessee to recover damages for a wrongful entry by the lessor, where it was not disputed that the parties agreed to a verbal lease for one year after the expiration of a written lease, and the defendant testified that the terms of the verbal lease were in accordance with the terms of the written lease in evidence, a finding in accordance with the testimony of the plaintiff, and with the terms of the verbal lease set forth in the complaint and not denied in the answer, showing a substantial accordance with the terms of the written lease, with a variation not material to the controversy, is sufficiently supported. (*Edmonds v. Webb*, 619.)
2. **SUFFICIENCY OF EVIDENCE—SUPPORT OF ORDER DENYING NEW TRIAL.**—Where the plaintiff recovered judgment for damages, and all the challenged findings are sufficiently supported by the testimony for the plaintiff, and findings as to the entry of the defendant and his ouster of plaintiff before the expiration of the undisputed verbal lease and as to the amount of the damages are not challenged, an order denying a new trial to the defendant, moved for on the ground of the insufficiency of the evidence, is properly supported, and must be affirmed upon appeal. (*Id.*)

LANDS. See Public Lands.

LARCENY.—See Criminal Law, 10, 11.

LEASE. See Landlord and Tenant.

LICENSE.

1. **MANDAMUS—LIQUOR LICENSE—COMPLIANCE WITH ORDINANCE—INSUFFICIENT SHOWING—TENDER—DEMAND**—A *mandamus* cannot be sustained to compel the issuance of a liquor license by municipal authorities, where there is no sufficient evidence of the petitioner's compliance with the requirements of the municipal ordinance providing for the issuance of such licenses, or tending to prove a tender by him of the money required for the license, and where there is neither averment, proof, nor finding of a demand by him for the license, or of facts showing that such demand would have been of no avail. (*Hippen v. Ford*, 315.)
2. **BURDEN OF PROOF—FINDINGS AGAINST EVIDENCE—APPEAL—REVERSAL OF JUDGMENT**.—The burden of proving that the petitioner complied with the law, and took all the necessary steps required to make it the duty of the municipal board to issue the license, is upon the petitioner; and if findings of such compliance are not sustained by the evidence, a judgment in his favor granting a writ of mandate must be reversed upon appeal. (*Id.*)

LIFE INSURANCE. See Insurance.

MALICIOUS PROSECUTION.

1. **CONSPIRACY OF DEFENDANTS—GRAVAMEN OF ACTION**.—An action will not lie for a mere malicious conspiracy wrongfully to prosecute an action. In an action for the malicious prosecution of a civil action, where a malicious conspiracy of the defendants is alleged, the *gravamen* of the action is not the conspiracy, but the injury to the plaintiff, arising from the malicious prosecution of the action. (*Dowell v. Carpy*, 168.)
2. **WANT OF PROBABLE CAUSE—TERMINATION OF PROSECUTION—INSUFFICIENT COMPLAINT**.—A complaint in an action for the malicious prosecution of a civil action, which does not aver that the alleged prosecution was without probable cause, as well as malicious, nor that it had terminated before the action was brought, is fatally defective. (*Id.*)
3. **JUDGMENT FOR PLAINTIFF—REVERSAL UPON APPEAL—QUESTION OF PROBABLE CAUSE**.—An averment that a judgment was rendered in favor of the plaintiff in the action alleged to have been maliciously prosecuted, and that it was reversed upon appeal, does not tend to show or raise a presumption that the action was without probable cause; but the rendition of the original judgment for the plaintiff would rather show probable cause for bringing the action, notwithstanding its ultimate reversal. (*Id.*)

MANDAMUS. See Bill of Exceptions, 3; Insane Persons; Licensee; Municipal Corporations, 1-4; Office and Officers, 2; Swamp and Overflowed Land, 3.

MASTER AND SERVANT.

1. **LIABILITY OF MASTER FOR DEFECTIVE APPLIANCES.**—A master is liable to the servant for injury caused from defective or unsafe appliances, the defects and danger from which were unknown to the servant, and were not obvious to his view. (*Starr v. Kreuzberger*, 123.)

2. **MEANS OF KNOWLEDGE—DUTY OF MASTER—RIGHTS OF SERVANT.**—The mere fact that the master and servant may have had equal means of knowledge will not save the master from liability. The master is bound to use the means of knowledge, and has no right to assume that the servant will discover defects in appliances rendering them unsafe. The servant has no such duty, but has a right to rely upon the master's means of knowledge, and duty of inquiry. He is not required to use any degree of care or diligence to discover defects or danger not obvious, and in regard to which he is not put upon inquiry by any discovery or suggestion of danger which it would be gross carelessness for him to neglect. (*Id.*)

3. **UNSAFE BRICK WALL—INJURY TO SERVANT—OBEDIENCE TO ORDERS—DANGER NOT OBVIOUS.**—Where an injury resulted to the plaintiff from the falling of an unsafe brick wall in front of which he was employed as a bricklayer in building a front wall under employers, one of whom directed the work, and the obeying of whose instructions caused the falling forward of the rear wall, which was not an obvious danger to the plaintiff of his obedience to orders, it was the duty of the employers to know the condition of the wall, and the plaintiff was justified in obeying the orders given, and the employers are responsible for the resulting injury. (*Id.*)

4. **CONSISTENCY OF FINDINGS—IGNORANCE OF UNSAFE CONDITION—COMPARATIVE OPPORTUNITY OF KNOWLEDGE.**—Findings that the plaintiff was ignorant of the unsafe condition of the wall, and that he did not have a better opportunity than the defendant for seeing and knowing its condition, are not contradictory. (*Id.*)

MEASURE OF DAMAGES. See Damages.

MECHANICS' LIENS.

1. **CONTRACTOR FULLY PAID—VALID CONTRACT.**—Where the contractor has been fully paid according to the terms of a valid building contract, no mechanics' liens can be enforced against the owner of the building. (*Blinn Lumber Co. v. Walker*, 62.)

MECHANICS' LIENS (Continued.)

2. **SUFFICIENCY OF MEMORANDUM OF CONTRACT.**—Where the original contract consisted of three parts, each signed by the parties, consisting of the agreement, the specifications, and the plans and drawings, a memorandum thereof, consisting of a verbatim copy of the contract and signatures thereto and a copy of the specifications referred to in the agreement as "signed by the parties," without giving such signatures, and a copy of the plans and drawings, referred to in the agreement as "signed by the parties and hereunto annexed," without such signatures, all of which were attached together and marked "Memorandum of contract" and filed with the recorder, is sufficient to make the contract valid, where, without the aid of oral evidence, it shows all that is required to be shown by a memorandum of the contract, under section 1183 of the Code of Civil Procedure. (Id.)
3. **ABSENCE OF SIGNATURES.**—The statute does not require the memorandum to be signed; and the absence of a copy of signatures from the specifications and from the plans and drawings does not vitiate the memorandum. (Id.)
4. **MEMORANDUM NOT PURPORTING TO BE COPY OF CONTRACT.**—Where there was nothing in the memorandum except the style of the writing to indicate that it was a copy of anything, its language, though reading like a contract, must be deemed that of a memorandum or statement of the substance of the contract. (Id.)
5. **REFERENCES IN MEMORANDUM TO PARTS OF ITSELF—FALSE DESCRIPTION HARMLESS—MAXIM.**—The reference in the memorandum to the plans and drawings as "hereunto annexed" is to the memorandum itself, and not to the original contract, and the references to the specifications, plans, and drawings as being "signed by the parties," must be deemed to describe them merely as parts of the memorandum, which asserts nothing as to the mode in which they were identified in writing as parts of the original contract, and, the defect being merely in the memorandum, the maxim, *Falsa demonstratio non nocet*, applies. (Id.)
6. **DETAILED DRAWINGS MADE DURING CONSTRUCTION—HARMONY WITH PLANS AND DRAWINGS FILED.**—Enlarged detailed drawings prepared during the construction of the building for the instruction of the workmen, which were in harmony with and did not change or add anything to the specifications, plans, and drawings filed with the recorder, and made parts of the memorandum, are not objectionable because not filed with the memorandum of contract. (Id.)
7. **UNNECESSARY REFERENCE IN CONTRACT.**—A reference in the contract to such enlarged drawings as "detail drawings" is not to one signed plans and drawings made a part of the contract, but it is an unnecessary reference, and does not affect the validity of the contract, if it indicates no change made therein. (Id.)

MECHANICS' LIENS (Continued).

8. **AMBIGUOUS REFERENCE—ORAL EVIDENCE—VALIDITY OF CONTRACT.**—The reference to "detail drawings" is sufficiently ambiguous to justify oral evidence of the architect to explain it, and to show that it referred to a mere amplification of the drawings which were a part of the contract, made during the progress of the work for the eye of the workman to indicate how that which was called for in the contract was to be done; although, without such explanation, the original contract was sufficient for the purposes of the law. (Id.)

See Attorney and Client; Bonds.

MINES AND MINING.

1. **MINING CLAIMS—PRIORITY OF LOCATION.**—The principle which governs the conflicting claims of appropriators of mining claims and other rights on the public domain is that, other things being equal, the prior locator prevails. (Conway v. Hart, 480.)
2. **RECORD OF LOCATION—ABSENCE OF MINING RULES.**—Where no mining rules or customs are made to appear requiring a record, it is not required by the Revised Statutes of the United States; but where a record of the notice of location is actually made which refers to some natural object or permanent monument, such as will identify the claim, the record is sufficient. (Id.)
3. **MARKING OF BOUNDARIES—REFERENCE IN NOTICE TO STAKES PREVIOUSLY SET.**—Where stakes had been previously set upon a former occasion by the locators to mark the boundaries of their claim, which so distinctly marked the location on the ground that it could be readily traced, they were not required to take them out and reset them or to plant other stakes to mark their boundaries, and it was proper for their notice of location to refer to those stakes. (Id.)
4. **DISCOVERY BEFORE LOCATION—VACANT PUBLIC LAND—SUPPORT OF FINDINGS.**—Where there was some evidence, though not very explicit, tending to support findings that a gold-bearing ledge was discovered and worked prior to the location relied upon by the plaintiffs, and that at the time of the location the land was vacant public land, subject to appropriation, the findings are sufficiently supported by evidence as against the defendant, who was a subsequent locator, and asserted no title antedating his location. (Id.)
5. **RIGHT OF ACTION BY PLAINTIFFS—OPTION TO THIRD PARTIES TO PURCHASE—DEED—DELIVERY—FINDING AS TO INTENTION—RECONVEYANCE IN ESCROW.**—A contract purporting to sell the mining claims of the plaintiffs to third parties for a sum to be paid on or before a certain date, and a deed purporting to convey the title to the purchasers left in their possession, but found by the court upon evidence not to have been intended as an absolute delivery, and a

MINES AND MINING (Continued).

reconveyance by them to the plaintiffs placed in escrow, to be delivered to the plaintiffs upon failure of the purchaser to make such payment, all bearing the same date, are to be taken as parts of the same transaction, and as intended to create substantially an option in such third parties to purchase the lands within a stated time for the sum fixed by the contract; and such option does not interfere with the right of action by plaintiffs to recover the possession of their claims, supposing them to be included in the contract and deeds, as against a subsequent locator. (Id.)

6. **OVERLAPPING OF CLAIMS—LINE OF STAKES SET BY COPLAINTIFF—NONAGREEMENT—ESTOPPEL.**—Where the subsequent location of the defendant's claim overlapped that of the plaintiffs, the subsequent fixing of a line of stakes by one of the plaintiffs, so as to lessen the overlap without the consent of the other plaintiff, and without any agreement by the defendant that such line should be a compromise boundary line between the claims, does not create an estoppel. (Id.)
7. **LIMITING CLAIM TO FIFTEEN HUNDRED FEET.**—Where the court found that fifteen hundred feet running southerly along the ledge from plaintiffs' northern stake and shaft, as described in their notice of location, would end somewhat north of what they claimed to be their southerly end line on defendant's subsequent overlapping claim, the court properly confined the claim of the plaintiffs to the actual length of fifteen hundred feet from their starting point. (Id.)
8. **EJECTMENT—ACTION NOT ARISING FROM LAND OFFICE.**—In an ordinary action of ejectment to recover the possession of a mining claim, not arising under the Revised Statutes of the United States out of an application to the United States land office for a patent, the rights of the parties, not as against the United States, but as against each other, are alone to be considered. (Id.)
9. **MINING CLAIMS—VALIDITY OF RELOCATIONS—EVASION OF ANNUAL WORK.**—A relocation made by mining claimants at the close of the year in the name of a nonresident, without his authority, under a pretense that they had abandoned their claims immediately prior to such relocation, with full knowledge that no annual work had been done or attempted, as required by the statute, and with intent to evade such requirement, and to preclude a subsequent valid location, has no validity or effect; and a location proper in form, made on the first day of the following year by another claimant, for failure of the former claimants to do the required annual work, is valid and effective. (McCann v. McMillan, 350.)
10. **ABANDONMENT OF CLAIMS—QUESTION OF INTENTION—FACTS AND CIRCUMSTANCES—INCONCLUSIVE TESTIMONY—SUPPORT OF FINDING.**—Abandonment of mining claims is a question of intention, which

MINES AND MINING (Continued).

it is the province of the jury or the trial court to determine in view of all the facts and circumstances of the case. The direct testimony of claimants that they abandoned the claims in controversy a few minutes before they relocated them in the name of another person is not conclusive; and a finding that they did not abandon them is supported, notwithstanding such testimony, where the facts and circumstances in evidence indicate its improbability, and justify the conclusion that there was no abandonment. (Id.)

11. **LOCATION OF BORAX CLAIMS—LODE CLAIMS—PLACER CLAIMS.**—It is not material that locations of mineral claims containing deposits of borate material, or borax, should be described either as lode claims, or as placer claims; and notices stating "that we, the undersigned, have this day located this ground for borate mining purposes," and describing claims fifteen hundred feet long and six hundred feet wide, are sufficient as notices of placer claims. (Id.)
12. **REFERENCE TO MONUMENTS IN NOTICE—LIBERAL CONSTRUCTION.**—Notices of location of mining claims are to be liberally construed; and references in a notice to an adjoining mine, and to the distance and direction of the claim from a named road and town, are presumed to be a sufficient reference to monuments to identify the claim. (Id.)
13. **MARKING OF BOUNDARIES—RECORD OF CLAIM.**—Though the distinct marking of the boundaries of a mining claim upon the ground so that they can be readily traced is essential to a valid location, yet the statute does not require that the record of the claim shall state that it is so marked upon the ground. (Id.)
14. **DISTRICT RECORD BOOK—CUSTODY OF COUNTY CLERK.**—Where the pleadings admit that the claims were located in a specified mining district, and the name of the recorder of that district is shown, a district record book showing records of locations in the district signed by such recorder, and produced by the county clerk, in pursuance of the act of 1897, then in force, comes from the proper custodian. (Id.)
15. **CUSTOM TO RECORD—SUPPLY OF EVIDENCE BY DEFENDANT.**—Evidence introduced from the district record book of the claims both of the plaintiffs and of the defendants is some evidence that there was a rule or custom to record mining claims in the district; and the absence of the proof of such custom by the plaintiff, objected to by the defendants, is supplied by the defendants' introduction of the same records to prove their locations. (Id.)
16. **LOCATION OF MINING CLAIMS—LIBERAL CONSTRUCTION OF PROCEEDINGS.**—The proceedings of miners in the location of mining claims are to be regarded with indulgence, and their notices of location are to be liberally construed. (Talmadge v. St. John, 430.)

MINES AND MINING (Continued).

17. **SUFFICIENCY OF RECORDED NOTICES—REFERENCE TO STATE AND COUNTY—OMISSION.**—Where the preliminary notice of location of a mining claim, recorded under the act of 1897, named the county in which the claim was located, and the final certificate of location referred to the posting and record of the preliminary notice, the fact that such certificate omitted to name the state and county of the purported location will not defeat the certificate of location, or the record thereof. (Id.)
18. **DESCRIPTION OF CLAIM—BOUNDARIES—REFERENCE TO MONUMENTS—CONSTRUCTION OF STATUTE.**—The statute of 1897, requiring that the recorded certificate of location shall contain "a description of the claim, defining the exterior boundaries as marked upon the ground, and such additional description by reference to some natural object or permanent monument as will identify the claim," is not to be construed as requiring a different reference or identification from that required by the Revised Statutes; and a reference to permanent posts or stone monuments erected on the exterior boundaries is sufficient. (Id.)
19. **POSSESSION OF CLAIM BY PRIOR LOCATORS—SUBSEQUENT LOCATION INVALID.**—Where the locators of a mining claim under a valid prior location had performed the requisite amount of annual labor thereupon, and were in actual possession of the claim, having a tent thereupon with their bedding and tools in charge of an employee holding possession for them, and their monuments marked upon the ground were plainly visible at the time of entry made by other locators, who made a location upon an alleged discovery of ore taken from the place where the prior locators had been working, such subsequent location can have no validity, though all the statutory requirements of location were complied with by the subsequent locators. (Id.)
20. **MINING CLAIMS—ANNUAL WORK—TUNNEL DEVELOPING OVERLAPPING CLAIMS—RELOCATION.**—Where the owner of a quartz mining claim is also the owner of another ledge, the surface ground of which overlaps the other, and has driven a tunnel into the overlapping claim to develop both ledges in good faith, the work of tunneling done upon the land common to both of the claims in excess of the annual work required by law is sufficient to prevent a forfeiture of the claim overlapped; and a relocation thereof by other claimants for failure to do the annual work, made while work was progressing in the tunnel, cannot be sustained. (*Mann v. Budlong*, 577.)
21. **RIGHTS OF MINING CLAIMANT—METHOD OF DEVELOPING MINE.**—Where the requisite annual work is done toward the development of a mining claim within its surface lines, a court will not be permitted to substitute its own judgment as to the wisdom and expediency of the method employed in developing the mine in place of that of the owner of the claim. (Id.)

MINES AND MINING (Continued).

22. **FINDING AGAINST DEVELOPMENT—INSUFFICIENCY OF EVIDENCE—PROOF OF OVERLAPPING—ABSENCE OF CONFLICT—IGNORANT WITNESSES.**—A finding that the work done in the tunnel upon the other claim did not tend to develop the claim in controversy is not sustained where the evidence shows without substantial conflict that the claims overlap, and that the work in the tunnel was actually done within the surface lines of both claims. The evidence of witnesses testifying to the contrary, who admitted upon cross-examination their ignorance of the boundaries of the claims is of no value, and is insufficient to raise a conflict. (Id.)

See Broker, 2-4; Injunction, 1; Office and Officers, 5, 6.

MORTGAGE.

1. **DEFAULT JUDGMENT—PAYMENTS TO MORTGAGEE PENDENTE LITE.**—A mortgagee who receives the entire amount of the mortgage indebtedness from the proceeds of a foreclosure sale had under a judgment obtained upon the default of the mortgagor to answer the complaint is liable to account to the mortgagor for all moneys received by him between the filing of the complaint in foreclosure and the sale, which by the terms of the contract between them should have been credited on the mortgage indebtedness, but for which no credit was given. (*Maddux v. County Bank of San Luis Obispo*, 665.)
2. **FORECLOSURE OF MORTGAGE—APPEAL OF JUDGMENT CREDITOR OF MORTGAGOR—PRIOR CONVEYANCE—APPELLANT NOT AGGRIEVED.**—In an action to foreclose a mortgage, where the record establishes that a judgment creditor of the mortgagor, made a party defendant, was subsequent in his claim of lien by attachment and judgment to a conveyance made by the mortgagor to his codefendant, and had, therefore, no lien upon the mortgaged premises, he is not aggrieved either by the exclusion of the judgment-roll and attachment papers in his action, nor by the admission of evidence for the plaintiff in support of his claims under the mortgage, and no alleged error therein will be examined upon the appeal of such judgment creditor. (*Dayton v. McAllister*, 192.)
3. **FORECLOSURE—ANNUITY OF WIFE CHARGED UPON HUSBAND'S LAND—PURCHASE BY SUBSEQUENT MORTGAGEE—FUTURE INSTALLMENTS—SECOND ACTION.**—A wife who has foreclosed a lien for installments due upon a life annuity charged upon her husband's land by an agreement of separation, and has purchased part of the land in satisfaction thereof, under a decree which allowed a subsequent mortgagee to sell the land subject to the wife's lien, but which did not provide for future installments, or for sales upon motion, may maintain a second action against such mortgagee, who purchases the land subject to her lien, to sell other portions thereof for further installments which have become due upon the annuity. (*Higgins v. San Diego Sav. Bank*, 184.)

MORTGAGE (Continued).

4. **PRACTICE UPON FORECLOSURE FOR PART OF DEBT—JUDICIAL ASCERTAINMENT OF FUTURE DEBT.**—Upon foreclosure of a lien for part of a debt which has fallen due, if the decree judicially ascertains and adjudicates the amounts of the debt yet to fall due, and makes provision for applying to the court upon motion for sale of more of the premises charged with the lien to satisfy the same, the proper practice is to file a motion in the cause reciting the proceedings and alleging that other installments of the debt have become due, and asking for a sale of the property. But when there is no such judicial ascertainment or provision in the decree, such motion is not proper, and a second action should be brought to sell other portions of the land for a portion of the debt which has subsequently become due. (Id.)
5. **FORECLOSURE OF MORTGAGE—CONVEYANCE INTENDED TO SECURE NOTE—SUFFICIENCY OF COMPLAINT.**—A complaint alleging that the defendants jointly executed to plaintiff a note for a specified sum, which is unpaid, and thereafter, as security for the payment of the same defendants, conveyed to plaintiff by deeds of grant certain described real estate, and "that said conveyance of said real estate by defendants to plaintiff is and was intended by both plaintiff and defendant to secure the payment of said promissory note," states a cause of action for the foreclosure of the deeds given by way of mortgage. (County Bank of San Luis Obispo v. Goldtree, 160.)
6. **ATTORNEY'S FEE STIPULATED IN NOTE—LIEN UPON LAND—ADMISSION OF AVERMENT.**—Where the note alleged to be secured by the deeds of grant was set out in the complaint, and contained a provision for the allowance of attorneys' fees in case of suit, the allegation of the complaint that the conveyance was "intended to secure the payment of said promissory note," includes the contract to pay the attorneys' fees, as well as the principal and interest of the note; and where such allegation was admitted at the trial, it was proper not only to give judgment for the attorneys' fees, but also to make them a lien upon the mortgaged premises. (Id.)
7. **DECREE OF FORECLOSURE—SALE IN SEPARATE PARCELS.**—Where the decree of foreclosure, in directing the sale of the mortgaged property, substantially followed the provisions of section 726 of the Code of Civil Procedure, and was in proper form under that section, if no defendant presented any equity to the court that he desired to have protected in the decree, no defendant can complain of its form. If the defendants desired to have the property sold in separate parcels, they should have proceeded to that end in accordance with section 694 of that code, by direction given at the sale, and cannot object upon appeal that the decree did not provide therefor. (Id.)

MORTGAGE (Continued).

8. **DEFICIENCY JUDGMENT.**—Under section 726 of the Code of Civil Procedure, which is constitutional and valid, the court was warranted in providing in the decree for the foreclosure of the deeds given by way of mortgage, for the entry of a deficiency judgment for any residue of the note left unpaid after the sale of the mortgaged premises. (Id.)
9. **FORECLOSURE OF MORTGAGE—PLEADING—NONPAYMENT OF NOTE INDORSED BEFORE MATURITY—SUPPORT OF JUDGMENT.**—In an action to foreclose a mortgage by the indorsee of a note which was payable "on or before two years after date," with interest payable semi-annually, etc., where the complaint shows an indorsement and delivery by the payee to the plaintiff less than thirty days after the date of the note and continuous ownership of the note and mortgage by plaintiff thereafter, and alleges payment of the interest for one year, and that the principal and interest thereafter accruing according to the terms of the note "still remains due and unpaid from the defendant [mortgagor] to this plaintiff," is sufficient to support a judgment for the plaintiff against the mortgagor. (Schwind v. Hall, 40.)
10. **DEMURRER FOR UNCERTAINTY—HARMLESS RULING—FAILURE TO PLEAD PAYMENT.**—Where the mortgagor answered the complaint, but failed to plead payment as a defense, the overruling of a demurrer interposed by him to the complaint for uncertainty as to the allegation of nonpayment, in not alleging that the note was not paid by him to the payee before the indorsement to the plaintiff, nor by the payee as indorser, if erroneous, is harmless, and cannot prejudice any substantial right of the mortgagor. (Id.)
11. **POSSESSION OF NOTE PRIMA FACIE EVIDENCE OF NONPAYMENT.**—The possession of the note by the payee, and by the plaintiff from the date of the indorsement, is *prima facie* evidence that it was not paid to either of them. (Id.)
12. **ASSUMPSIT—MONEY PAID FOR USE OF MORTGAGOR—FORECLOSURE—PROCEEDS OF CROPS RETAINED BY MORTGAGEE—MUTUAL MISTAKE OF LAW.**—Money arising from the proceeds of crops grown on mortgaged premises by the mortgagor, which was received by the mortgagee pending foreclosure of the mortgage, and allowed to be retained by him, without being credited on the mortgage, under a mutual mistake of law that the mortgagee was entitled to the crops, must be regarded as money paid to the mortgagee for the use of the mortgagor, to be paid to him on demand, under an implied promise, which may be enforced by him or his assignee in an action of *assumpsit*. (Gregory v. Clabrough's Exrs., 475.)
13. **IMPLIED PROMISE—MONEY PAYABLE ON DEMAND—PLEADING AND PROOF—FRAUD NOT IN ISSUE.**—It is not necessary, in an action to recover the money so paid to the use of the plaintiff's assignor, to

MORTGAGE (Continued).

allege or prove the implied promise; but it is sufficient to allege that the money was received by the defendant for and on behalf of plaintiff's assignor, to be held by him until demanded by said assignor, and to prove that it was the money of the assignor paid to the defendant under a mutual mistake of law. In such action, the fraud of the defendant is not in issue. (Id.)

14. **ESTOPPEL—RES ADJUDICATA—COUNTERCLAIM IN FORECLOSURE SUIT—CONNECTION WITH SUBJECT OF ACTION—ASSIGNMENT OF CLAIM.**—A claim for the recovery of money paid to a mortgagee under a mistake of both parties that he was entitled to the crops of which it was the proceeds, which had been assigned by the mortgagor before answer was filed in the foreclosure suit, is not so legally connected with the subject of the action as to be barred by failure to plead it as a counterclaim; but the assignment was evidence of the election of the mortgagor that the money should be recovered in a separate action, and the assignee's rights could not be affected by any counterclaim or defense made by the assignor. (Id.)
15. **COUNTERCLAIM UNDER EXPRESS AGREEMENT—MONEY PAID UNDER MISTAKE NOT INCLUDED.**—A counterclaim set up by the mortgagor in the foreclosure suit under an express agreement of the mortgagee to pay a fixed sum to the mortgagor, which included the proceeds of the mortgagor's crops and other money, for a deed to be made by the mortgagor, which counterclaim was found against him, did not include or affect the right of the mortgagee or his assignee to recover the money paid to the mortgagee under mistake. (Id.)
16. **FORECLOSURE OF MORTGAGE—PARTIES DEFENDANT—PLEADING—RES ADJUDICATA—ADVERSE TITLE NOT INVOLVED.**—Where the plaintiffs in the action to quiet title, having a title prior, adverse, and paramount to that of the mortgage, were made parties defendant to the foreclosure thereof, under the usual allegations in the complaint that the defendants other than the mortgagor claim some interest in the premises, and that such interest is subsequent and subordinate to that created by the mortgage, without setting forth the particulars of the defendants' claim, or showing that it was prior in time to the mortgage, the judgment of foreclosure does not become *res adjudicata* as to the prior adverse title of the plaintiffs. (Beronio v. Ventura County Lumber Co., 232.)
17. **OBJECT OF FORECLOSURE OF MORTGAGE—TITLE OF MORTGAGOR AT DATE OF MORTGAGE—PROPER PARTIES—DISMISSAL OF ADVERSE CLAIMANTS.**—The object of a suit to foreclose a mortgage is to vest in the purchaser at the sale the same title or estate which the mortgagor had at the date of the mortgage; and the only proper or necessary parties defendant are the mortgagor and those claiming under him subsequent to that date. Titles adverse to that of the

MORTGAGE (Continued).

mortgagor, or superior to the mortgage, are not proper subjects for determination; and the proper action of the court is to dismiss from the suit any of the defendants who appear to be adverse claimants of such title. (Id.)

18. **CONCLUSIVENESS OF JUDGMENT AGAINST ADVERSE CLAIMANT—PLEADINGS.**—If the complaint in foreclosure sets forth the facts upon which an adverse claimant made defendant bases his claim of title, and he allows issues to be tried thereon without objection, he is concluded by the judgment; but if it merely avers that he claims an interest, and that such interest is subsequent and subordinate to the mortgage, it negatives any claim of plaintiff that it was prior thereto and presents a mere conclusion of law, and the denial of these averments does not raise an issue upon a claim of title prior and adverse to that covered by the mortgage, or upon the validity thereof, and a claim of such title is not concluded by the judgment. (Id.)
19. **FORECLOSURE OF MORTGAGE—HOSTILE TITLE NOT TO BE LITIGATED.**—In an action to foreclose a mortgage, a title asserted which is paramount and hostile to that both of the mortgagor and mortgagee cannot be litigated, but must be asserted in a different action. (Murray v. Etchepare, 318.)
20. **CROSS-COMPLAINT—CONVEYANCE PROCURED BY FRAUD OF MORTGAGOR—KNOWLEDGE OF MORTGAGEE—INJUNCTION.**—A cross-complaint of a defendant in such action, who was a former owner of the mortgaged premises, averring that the conveyance made to the mortgagor was procured by fraud and false representations on his part, and that these facts were known to the plaintiff when the mortgage was taken, and praying for an injunction to restrain the foreclosure of the mortgage, asserts a paramount and hostile title, and should not be permitted to be filed. (Id.)
21. **INSUFFICIENT ANSWER—JUDGMENT UPON PLEADINGS.**—Where the facts averred in the cross-complaint are also set forth in the answer of the same defendant, they constitute no defense to the action of foreclosure, and judgment is properly rendered for the plaintiff upon the pleadings foreclosing the mortgage for the amount found to be due. (Id.)
22. **FORM AND EFFECT OF DECREE OF FORECLOSURE—ADVERSE TITLE NOT AFFECTED.**—A decree of foreclosure is in better form when it expressly saves all paramount and hostile rights asserted by a defendant; but the absence of such form is not material, as the decree, no matter what its terms may be, has no effect whatever upon a paramount and adverse title or estate. (Id.)
23. **ADVERSE EQUITABLE ESTATES.**—The principle that adverse titles cannot be litigated in a foreclosure suit, and are not affected by the decree of foreclosure, applies as well to adverse equitable estates as to adverse legal estates. (Id.)

MORTGAGE (Continued).

See Building and Loan Association; Estates of Deceased Persons, 1-4; Homestead; Receiver, 6, 14, 15; Statute of Limitations, 1, 2; Taxation, 3; Writ of Assistance.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL FRANCHISE FOR ELECTRIC LIGHT AND POWER—MANDAMUS—PLEADING—DEMAND AND REFUSAL.—In an action of *mandamus* to compel the board of trustees of a town to grant a franchise to the plaintiff to erect and maintain poles and wires along the streets of the town for the purpose of conveying electricity for power and lighting purposes to its inhabitants, where the complaint sets forth a sufficient petition presented to the board for the franchise, which it alleges was denied, and that the board refused to take further action thereon, the averment of demand and refusal is sufficient. (*Pereria v. Wallace*, 397.)
2. SPECIAL DEMAND FOR SPECIFIC ACTS OF DUTY NOT REQUIRED.—The complaint need not allege a special demand upon the board for the performance of specific acts or steps required of them in the granting of the franchise. The refusal to grant the franchise was a refusal to take any of the steps required of them, and no further demand was necessary. (*Id.*)
3. HEARING UPON VERIFIED PETITION—FAILURE TO ANSWER—PROOF—FINDINGS OF COURT.—In a hearing had upon a verified petition for a writ of mandate, where the defendant has failed to answer, the truth of all the facts alleged is conceded, and they do not need to be otherwise proved; and where the court in such case heard the cause upon the complaint, and made and filed findings in accordance therewith, the judgment entered thereupon is not contrary to law or void, as being a judgment by default. (*Id.*)
4. PRIVILEGES GRANTED TO RIVAL COMPANY—PLEADING—WAIVER OF OBJECTIONS—FINDINGS—PRESUMPTION OF EVIDENCE—JUDGMENT.—Where the complaint showed that four of the trustees were interested in a rival company engaged in furnishing electricity for light and power, and that at the meeting at which plaintiff's petition was rejected the route of such rival company was approved, though not specifically alleging, as it should, the conditions of its franchise, yet, in the absence of a special demurrer, and of objections to evidence, it must be presumed that a finding, in addition to the facts alleged, that such company did not bid for its franchise, and that it was not sold to it, was sustained by evidence; and a judgment upon the findings awarding a writ of mandate to the trustees to grant the same privileges which were bestowed upon such company, is not objectionable. (*Id.*)
5. FRANCHISES UNDER CONSTITUTION—CONSTRUCTION—MANDATORY AND PROHIBITORY PROVISIONS—ACT FOR SALE UNCONSTITUTIONAL.—In section 19 of article XI of the constitution, the word "city" is to be construed as including "town"; and the privileges therein

MUNICIPAL CORPORATIONS (Continued).

granted of using the public streets, and of laying down pipes and conduits therein, under the regulations and conditions provided for in the section, for the purpose of supplying the city and its inhabitants with illuminating light, etc., are mandatory and prohibitory, and exclude the right of the municipality to award such privileges to the highest bidder. The act of 1897 (Stats. 1897, p. 135), providing for the public sale of such franchises, is unconstitutional. (Id.)

6. **DUTY OF MUNICIPAL OFFICERS—IMPAIORITY OF PRIVILEGES UNDER REGULATIONS—PRIOR GRANT OF FRANCHISE.**—It is the duty of the officers of a municipality, subject to the regulations provided for in the constitution, to grant to any applicant a franchise for the use of its streets for poles and wires for the purpose of supplying the municipality and its inhabitants with electricity for the purposes of light and power. A prior grant of a similar franchise or privilege to other persons or corporations is no reason for not granting it to another. (Id.)
7. **GENERAL REGULATIONS FOR DAMAGES AND INDEMNITY—JUDGMENT FOR EQUAL PRIVILEGES—PRESUMPTION—ESTOPPEL OF TRUSTEES.**—Where it does not appear that the town trustees had made any "general regulations for damages and indemnity for damages," such as are referred to in section 19 of article XI of the constitution, but it does appear that they had granted a privilege to another company identical with that sought by and awarded to the plaintiff, the judgment awarding the same privilege necessarily includes whatever regulations are imposed upon that company. It must be presumed that the grant of equal privileges to the two companies does not exceed the powers or duties of the trustees; and the trustees cannot assert the contrary as against the plaintiff. (Id.)

See Irrigation District; License; Reclamation District; Sanitary District; Schools; Street Assessment; Streets, Roads, and Highways; Street Railroad.

MURDER AND MANSLAUGHTER. See Criminal Law, 12-43.

MUTUAL BENEFIT ASSOCIATION. See Corporations, 7-10.

NATIONAL BANKS. See Taxation.

NEGLIGENCE.

1. **FINDINGS—SUFFICIENCY OF EVIDENCE—SUPPORT OF JUDGMENT.**—In an action for a personal injury alleged to have been caused by the negligence of the defendant, in order to support a judgment for the plaintiff, it must appear both that the defendant was negligent and that the plaintiff was free from negligence, if there is no evidence tending to show that defendant's conduct was wanton or willful. But, in order to support a judgment for the defendant, it is

NEGLIGENCE (Continued).

sufficient if it appear either that the plaintiff was negligent, or that the defendant was free from negligence, and it is not necessary that findings upon both of these points should be sustained by the evidence. (*Wolfskill v. Los Angeles Ry. Co.*, 114.)

2. **INJURY FROM FRIGHTENED HORSES—CONFLICTING EVIDENCE.**—Where the plaintiff was injured from being struck by frightened horses driven by the defendant, and the court found that at the time of the injury the driver of the team was free from negligence, and that the plaintiff was then negligent in going in front of the horses as they approached him, without looking or taking care to avoid being run against by them, and the evidence was substantially conflicting upon both points, the decision in the trial court as to the weight of the evidence cannot be reviewed upon appeal; and there being some evidence to justify the findings, the judgment for the defendant cannot be disturbed. (*Id.*)

See Attorney and Client; Master and Servant.

NEGOTIABLE INSTRUMENTS.

1. **PROMISSORY NOTE—INDORSEMENT—WAIVER OF DEMAND, PROTEST, AND NOTICE—WORDS STAMPED ON NOTE—JOINT AND SEVERAL CONTRACT—PRESUMPTIONS.**—The words, "For value received, I hereby waive demand and notice of demand, protest, and notice of protest and nonpayment," when not written over the name of the first indorser of a promissory note by himself, but printed upon the back of the note with a rubber stamp before any of the names of a number of required accommodation indorsers were written thereupon, are not limited to the first of such indorsers, but must be deemed a part of the note, and, notwithstanding the use of the singular number, must be presumed to be the joint and several contract of all of the indorsers, who must be presumed to have read the words and to have adopted them as their contract; and the bank discounting the note, whose president had affixed the stamp, had a right to assume, on return of the note thus signed, that each and every indorser was severally bound by the waiver. (*Farmers' Exchange Bank v. Altura Gold Mill etc.*, 263.)
2. **EVIDENCE—INTENTION OF INDORSER IMMATERIAL.**—Evidence of the intention of an indorser not to waive presentation or notice, who is found on sufficient proof to have attached his signature under the stamped waiver, is not admissible, and, if admitted without objection, is irrelevant and immaterial, and cannot affect or change his liability. (*Id.*)
3. **ACTION UPON LOST NOTE—TENDER OF INDEMNITY BOND—OFFER IN COMPLAINT—FILING—SERVICE—COSTS.**—Where an indemnity bond against a lost note is not tendered before suit, but is offered in the complaint and filed with it, it must be deemed tendered when the

NEGOTIABLE INSTRUMENTS (Continued).

complaint is served upon the defendant, and if defendant then offers to pay or to let judgment be taken, plaintiff cannot recover costs; but if the defendant persists in making defense to the action, and plaintiff recovers, he should recover all costs thereafter accruing. (Id.)

4. **UNSUCCESSFUL DEFENSE—RECOVERY OF COSTS—INSUFFICIENT RECORD UPON APPEAL.**—Where the action upon the lost note was unsuccessfully defended after tender of an indemnity bond in the complaint, and the record upon appeal does not show what costs had accrued at the time the bond was filed, or when it was tendered, the judgment for costs will not be disturbed upon appeal. (Id.) See Joint Debtors; Mortgage, 9-11.

NEW TRIAL.

1. **NEWLY DISCOVERED EVIDENCE—EXTENSION OF TIME TO FILE AFFIDAVITS.**—Under section 659, subdivision 1, of the Code of Civil Procedure, the court has power to extend the time for filing affidavits on motion for a new trial to more than thirty days beyond the statutory time. The limitation on the court's power of extending time in other classes of cases imposed by section 1054 of that code has no application to such a case. (Oberlander v. Fixen & Co., 690.)
2. **CUMULATIVE EVIDENCE—APPEAL.**—Under section 657 of the Code of Civil Procedure, a new trial asked for on the ground of newly discovered evidence should not be refused merely because the evidence is cumulative in a case where the cumulation is sufficiently strong to render a different result probable. Whether the evidence is or is not of this character is not a question of law, but is for the judgment of the trial judge, whose discretion will not be interfered with on appeal, except in cases of manifest abuse. This rule obtains on appeal, whether the motion for a new trial is granted or denied by the trial court. (Id.)
3. **DILIGENCE IN DISCOVERY.**—The question whether the newly discovered evidence could with reasonable diligence have been discovered and produced at the trial is for the trial judge, and his determination will be regarded as conclusive on appeal unless it appears that his discretion has been abused. (Id.)
4. **NOTICE OF INTENTION—LIMITATION OF TIME.**—The time for serving and filing a notice of intention to move for a new trial is not necessarily limited by the time in which an appeal may be taken from the judgment; and, except in cases of laches or waiver, the time therefor is not limited otherwise than as is expressed in section 659 of the Code of Civil Procedure. (Mallory v. See, 356.)
5. **WRITTEN NOTICE OF DECISION—CONSTRUCTION OF CODE.**—The notice of decision required by section 650 of the Code of Civil Procedure is,

NEW TRIAL (Continued).

by the terms of section 1010 of the same code, required to be in writing; and section 659 is to be construed as if the terms therein were "after written notice of the decision of the court." (Id.)

6. **ACTUAL NOTICE OF DECISION—AFFIDAVIT OF OPPOSITE PARTY—INTENT OF STATUTE—RUNNING OF TIME.**—Mere actual notice of the decision of the court, not evidenced by written notice, or by facts establishing a legal waiver thereof, but proved merely by affidavit of the opposite party, cannot be a substitute for the written evidence of notice prescribed by the statute. The obvious intent of the statute cannot be thus defeated; and the time within which to give notice of intention to move for a new trial will only run from written notice of the decision, unless a waiver thereof is properly shown. (Id.)
7. **WAIVER OF WRITTEN NOTICE OF DECISION—RECORD PROOF.**—The statutory provision requiring written notice of the decision of the court is solely for the benefit of the moving party, and may be waived by him; but it will only be deemed waived when the waiver is evidenced by some act or acquiescence of the moving party manifested by the record, files, or minutes of the court. Where the moving party has acted in open court or in the proceedings of the cause as if he had formal notice of the decision, his acts constitute a waiver of such formal notice. (Id.)

See Appeal, 3-5, 7; Criminal Law, 37-39, 43; Landlord and Tenant, 2.

NOTICE. See Appeal, 18, 19.

OFFICE AND OFFICERS.

1. **COUNTY GOVERNMENT—COMPENSATION OF CONSTABLES—CHANGE OF TOWNSHIP—CONSTRUCTION OF STATUTE.**—Subdivision 14 of section 183 of the County Government Act, providing for salaries in addition to fees of constables in townships numbered 1 to 10 in counties of the twenty-sixth class, is to be construed as referring only to a subsisting system of ten townships so numbered, and not as applying to any part of a changed system of sixteen townships, notwithstanding a portion of the new townships may bear the same number and cover the same territory as before. (Lougher v. Soto, 610.)
2. **CONSTITUTIONAL LAW—SPECIAL LEGISLATION—MANDAMUS.**—Such provision for the salaries of constables is special legislation, in contravention of the constitution, in not providing for all of the townships, and officers of any changed system, whether it be construed as referring to those townships in the changed system bearing the same number as before or not. In either aspect, *mandamus* will not lie to compel the payment of a salary provided for a numbered township, having the same number and covering the same territory in both systems. (Id.)

OFFICE AND OFFICERS (Continued).

3. **OFFICE—VACANCY—COMPENSATION OF APPOINTEE—INCREASE NOT ALLOWED DURING TERM.**—The salary attached to a county or municipal office at the beginning of an official term must continue without increase during the entire term for which the officer was elected, notwithstanding the creation of a vacancy in the term, which is filled by the appointment of another. (*Storke v. Goux*, 528.)
4. **CHANGE IN SALARY BEFORE APPOINTMENT—CONSTITUTIONAL LAW.**—Notwithstanding the passage of a new county government act increasing the salary of a district attorney in counties of the same class, prior to the appointment of a district attorney to fill a vacancy caused by the death of the original incumbent, but subsequent to the beginning of the original term, the appointee is precluded by section 9 of article I of the constitution from availing himself of the increased salary. (*Id.*)
5. **MINING CLAIMS—RECORD OF LOCATIONS AND PROOFS OF LABOR—PERMISSIVE LAW—DUTY OF RECORDER—ACTION UPON BOND FOR FEES.**—Notwithstanding the repeal of the state mining law of 1897, which required all notices of location of mining claims and proofs of annual labor to be recorded in the county recorder's office, the permissive record thereof still allowed by the amendment of 1897 to section 1159 of the Civil Code makes it the duty of the county recorder, by the terms of the County Government Act, to record them, and to pay the fees received therefor into the county treasury, and, upon his failure to do so, an action will lie upon his official bond to recover the fees received by him for such record. (*County of Kern v. Lee*, 361.)
6. **VALIDITY AND EFFECT OF RECORD NOT INVOLVED.**—The validity or invalidity of the records as evidence of title or notice of claim is not involved in an action based upon the duty of the recorder to record instruments permitted by law to be recorded. Such duty does not depend upon the validity or effect of the instrument offered for record, or of the record thereof. (*Id.*)
7. **ACTION INVOLVING TITLE TO OFFICE—JUSTICE OF THE PEACE—PARTY NOMINATION—LEGALITY OF ELECTION—INSUFFICIENT COMPLAINT.**—A complaint setting forth that at a former election plaintiff was elected justice of the peace of a specified township, and had qualified and acted as such continuously until the commencement of the action, and that at the last election defendant's name was placed upon the ballot as having been nominated by a Republican convention, when he had not been so nominated, and that his election was illegal, but that he had received the certificate of election, and would exercise the functions of the office unless restrained, and praying for an injunction to restrain from so doing, does not state a cause of action. (*Powers v. Hitchcock*, 325.)
8. **QUO WARRANTO—INTRUSION INTO PUBLIC OFFICE NOT SHOWN.**—The complaint showing that the plaintiff is in the exercise of the office, and not alleging or suggesting that the defendant has usurped

OFFICE AND OFFICERS (Continued).

or intruded into the office, does not state a cause of action in *quo warranto*. (Id.)

9. **CONTEST OF ELECTION—STATUTORY GROUND NOT SHOWN.**—The complaint showing that defendant wrongfully procured his nomination, or had his name illegally placed upon the tickets, does not show a statutory ground for contesting the election. (Id.)
10. **NOMINATION BY ELECTORS NOT NEGATIVED—PRESUMPTION—PERFORMANCE OF OFFICIAL DUTY.**—The complaint not expressly negating the nomination of the defendant by petition or certificate containing the signature of a sufficient number of electors, and expressly showing that the clerk received the name of the defendant upon the ballots, and that a certificate of election had been issued to him, it must be presumed that official duty was regularly performed, and that the defendant was nominated and elected, and duly received the certificate of election. (Id.)
11. **ACTION UPON OFFICIAL BOND—DELIVERY OF RECORDER'S FEE-BOOK TO AUDITOR—CONSOLIDATED OFFICE—SUPPORT OF FINDINGS AND JUDGMENT.**—In an action by a county upon the official bond of the county recorder to recover damages for his alleged failure to deliver his fee-book to the county auditor at the expiration of his term, findings made upon sufficient evidence that the offices of county auditor were consolidated, and that the fee-book was in its proper place among the auditor's books when the office was delivered to his successor, sustain a judgment for the defendants, and it is immaterial whether or not findings as to the value of the book and the amount of damage from its loss are or are not supported by the evidence. (County of Sonoma v. Hall, 659.)
12. **EVIDENCE—REBUTTAL—COPYING DONE BY CLERK—ORDER STRIKING OUT—PRESUMPTION.**—Evidence offered in rebuttal that copying was done in the office by a clerk at the dictation of the recorder, which was not properly in rebuttal, and which did not show that the copying was from the fee-book in question, was properly stricken out by the court. It cannot be presumed that the book dictated from was such fee-book, nor that the witness was making a false and pretended copy thereof, nor that the testimony was admissible for any purpose not shown by the record. (Id.)
13. **CROSS-EXAMINATION OF DEFENDANT—PROPER PRACTICE—HARMLESS RULINGS.**—Where the defendant had testified in chief that he had left the fee-book in question in the usual place in the office, it would be proper practice to allow questions to be asked on cross-examination as to whether or not he kept two sets of fee-books, and whether he had not, with the assistance of a copyist, made a duplicate of the fee-book in question; but where the witness testified in other parts of his cross-examination that he never had but one fee-book, and never kept two sets of fee-books, and no questions were addressed to showing that he left a duplicate or a false

OFFICE ANR OFFICES (Continued).

copy in the office, a ruling against the questions asked is not of sufficient importance to justify a reversal of the judgment. (Id.)

ORDINANCE. See License.

PARENT AND CHILD. See Divorce, 3-5.

PARTIES. See Injunction, 6; Irrigation District, 2, 4-7; Joint Debtors, 4; Mortgage, 16; Receiver, 10.

PARTNERSHIP.

1. **ACTION ON BOND OF CONSIGNEE—PLEADING—CONTINUANCE OF PARTNERSHIP.**—In an action by members of a partnership against the sureties on the bond of a consignee, a complaint which averred that "during all the times hereinafter mentioned, they were copartners doing business under the firm name and style" designated, and that "ever since" a day specified the consignee named "failed and refused to account for any portion of said balance" specified which "is yet due and unpaid," may be fairly said to show a continuance of partnership from the first time mentioned in the complaint to the commencement of the action. (Braun v. Woollacott, 107.)
2. **EXPIRATION OF TERM—NEW FIRM—WINDING UP FORMER BUSINESS—COLLECTION OF ACCOUNTS.**—Notwithstanding the expiration of the term of the original partnership, and the purchase of the interest of one of the members, and the formation of a new partnership by other members, it being agreed that certain accounts not assumed by the new partnership, including the account in suit, should belong, when collected to the former partnership, it was competent for the partners to treat the former partnership as continuing for the purpose of winding up its business and collecting the account in suit. (Id.)
3. **BOND GIVEN TO PARTNERSHIP—ACTION IN FIRM NAME AFTER DISSOLUTION.**—Where the bond sued upon shows upon its face that it was given to the partnership bringing the action, the action may be brought thereon by the partners in the copartnership name, notwithstanding the previous dissolution of the partnership by the expiration of the term limited therefor. (Id.)
4. **CONTINUING POWERS OF PARTNERS AFTER DISSOLUTION.**—The powers of the partners with respect to rights created pending the partnership remain after dissolution. (Id.)
5. **AGREEMENT OF PARTNERSHIP TO CONSIGN MERCHANDISE—CONSTRUCTION OF BOND OF CONSIGNEE.**—Where the partnership made an agreement for a term of one year to consign a stock of merchandise and such other goods as the parties might after its date agree upon, to be handled by the consignee on consignment only, etc., a

PARTNERSHIP (Continued).

contemporaneous bond given by the consignee to the partnership for the faithful discharge of all his duties as consignee, and to account for all money, and all property, goods, and chattels and other things which might come into his possession or under his control as such consignee, within a limit of two thousand dollars, is to be construed as applying to all goods consigned and accepted on consignment during the life of the contract, and as standing for the faithful performance of all the covenants of the consignee, not exceeding the limit of two thousand dollars. (Id.)

6. **PAROL EVIDENCE—EXPLANATION OF UNAMBIGUOUS CONTRACT.**—The contract and bond being unambiguous in their terms, parol evidence is inadmissible to show the meaning of the phrase "stock of merchandise" used in the contract, and that the contract and bond were understood by the parties to be limited to the first "stock of merchandise" furnished to the consignee to enable him to open up business, and to mean that no more merchandise than two thousand dollars in value was to be furnished to him. (Id.)
7. **PLEADING—INCOMPETENT DEFENSE—PROPER EXCLUSION OF EVIDENCE—CONVERSATIONS PRIOR TO WRITTEN CONTRACT.**—The fact that the answer alleged as matter of defense facts which were irrelevant, immaterial, and incompetent, in regard to the construction of the contract and bond, and as to what they were intended to cover, cannot justify parol evidence to show conversations between the parties prior to the execution of the written contracts, for the purpose of interpreting them contrary to their unambiguous meaning. (Id.)
8. **LIABILITY OF SURETIES OF CONSIGNEE—HANDLING OF GOODS BY PARTNERSHIP.**—The goods having been consigned to the consignee personally in pursuance of the contract, the sureties on his bond are liable for his failure to account therefor within the limit of two thousand dollars, and it is immaterial that the goods were in fact handled by a partnership of which he was a member. (Id.)
9. **PURCHASE AND SALE OF LAND—DISSOLUTION AND ACCOUNTING—LAND IN NAME OF ONE PARTNER—ENCUMBRANCES—SALE—RELIEF.**—In an action to dissolve a partnership for the purchase and sale of real estate, and for an accounting and settlement thereof, real estate shown to belong to the partnership should be treated as personal property, and sold to pay debts, and the residue distributed; and it is improper for the court to decree that the plaintiff recover from the other partner and from codefendants an undivided half of real property which stood in the other partner's name, and was encumbered or conveyed while in his name for the payment of partnership and private debts. (Moran v. McInerney, 29.)

PARTNERSHIP (Continued).

10. **RIGHTS OF PARTNERS—DISTRIBUTION SUBJECT TO LIENS—CONSENT REQUIRED.**—Each partner is entitled to have the interests of the partners severed upon a dissolution and accounting; and unless the partners consent to distribution of partnership real property subject to liens to secure partnership debts and the individual debts of the partners, such a decree should not be entered. (Id.)
11. **POWER OF COURT AS TO LIENS.**—The court has no power to declare that certain debts, and especially costs, shall constitute liens on the partnership real estate, nor to create a lien upon the partnership property or the portions thereof assigned to the parties; but, if costs or indebtedness are properly payable out of the partnership assets, the court should order them paid out of the proceeds of a sale of such assets. (Id.)
12. **ANSWER OF CREDITOR OF DEFENDANT PARTNER—AFFIRMATIVE RELIEF—ABSENCE OF SERVICE—UNAUTHORIZED JUDGMENT.**—An answer of an individual creditor of the defendant partner which claimed the affirmative relief of payment out of his interest in the partnership real estate, if not served upon such partner, nor answered by him as a cross-complaint, cannot support a judgment against him in favor of such creditor for the affirmative relief demanded. (Id.)
13. **EXECUTION SALE OF DEFENDANT'S INTEREST—INTERESTS NOT DEFINED—IMPROPER DECREE.**—An execution sale of the defendant partner's interest in specified real estate of the partnership which stood in his name will not justify a decree which does not define the interest of the defendant partner or of the purchaser in such real estate, and does not award a liquidation of the partnership debts, and a sale and distribution of the partnership assets in definite amounts and proportions to specified persons, and which improperly awards a recovery by the plaintiff against all of the defendants of an undivided half of such specified real estate. (Id.)
14. **JUDGMENT IN FAVOR OF MORTGAGEE—FINDINGS.**—A judgment in favor of a mortgagee of part of the partnership property, which is not supported by the findings, is erroneous. (Id.)

See Sale, 5.

PLACE OF TRIAL.

1. **VENUE OF ACTION—DIVERSION OF WATER—DITCH IN TWO COUNTIES—INJURY TO REAL PROPERTY—INJUNCTION.**—The right of the owner of a ditch situated in two counties to have water flow therein is coextensive with its right to the ditch; and a diversion of water therefrom in one of the counties is an injury to the real property of the owner in the other county. An action to enjoin such diversion is properly brought in either county. (Last Chance Water Ditch Co. v. Emigrant Ditch Co., 277.)
2. **CHANGE OF PLACE OF TRIAL—PLACE OF BUSINESS OF CORPORATION DEFENDANT—DIVERSION IN ANOTHER COUNTY.**—The fact that the

PLACE OF TRIAL (Continued).

defendant in an action to enjoin the diversion of water from a ditch situated partly within the county of the venue is a corporation having its principal place of business in another county, in which the ditch is also situated, and that it diverted and used the water in that county, cannot entitle the defendant to a change of the place of trial of the action to that county. (Id.)

PLEADING.

1. **QUIETING TITLE—ANNULMENT OF SHERIFF'S DEED—MORTGAGE SUBSEQUENT TO CONVEYANCE—SINGLE CAUSE OF ACTION—DEMURRER FOR MISJOINDER.**—A complaint seeking to quiet plaintiff's title, and also to annul a sheriff's deed to the defendant under foreclosure of a mortgage made subsequently to the record of a conveyance by the mortgagor under which plaintiff claims title, states only a single cause of action for the enforcement of plaintiff's right to the premises in question against the unlawful claim of the defendant thereto, and is not subject to a demurrer for misjoinder of causes of action. (*Beronio v. Ventura County Lumber Co.*, 232.)
2. **PLURAL REMEDIES FOR SINGLE RIGHT.**—A plaintiff may frequently be entitled to several remedies of different kinds for the enforcement of a single right of action. (Id.)
3. **ORDER UPON DEMURRER—LIMITED RULING—REVIEW UPON APPEAL.**—The court cannot limit its order upon demurrer by sustaining it in part and overruling it in part, so as to deprive the demurrants of the benefit of any of the grounds assigned; and upon appeal by the plaintiff from a judgment rendered upon demurrer to the complaint, which was sustained as to the general demurrer, and overruled in other respects, the ruling made will be considered as an entirety, and the judgment must be affirmed if the demurrer is well taken upon any of the grounds assigned, regardless of the reasons assigned by the court below for its order. (*Sechrist v. Rialto Irr. Dist.*, 640.)
4. **AMENDMENT OF COMPLAINT AT TRIAL—CHANGES MADE IN ORIGINAL COMPLAINT—CONSENT OF COUNSEL.**—Where the complaint was allowed to be amended at the trial, which was made by oral consent of the defendant's counsel in presence of the court by changing a figure in the original complaint, so as to increase the amount of money sued for in one count of the complaint, and amending the prayer accordingly, it being agreed that the answer should stand as the answer to the complaint as amended, the defendant is bound by such consent, and cannot afterward object to the regularity of the amendment. (*Coonan v. Loewenthal*, 197.)
5. **REPRESENTATION OF CLIENT BY ATTORNEY—WORDS AND ACTIONS IN PRESENCE OF COURT.**—Where a party appears by attorney, the at-

PLEADING (Continued).

torney has the control and management of the cause, and his words and actions in the presence of the court concerning the trial of the cause are the same as though said and done by the party himself. (Id.)

6. **CODE RULE AS TO STIPULATION—ORAL CONSENT TO ACT PERFORMED—FRAUD NOT PERMITTED.**—Where oral consent in the presence of the court has been given by the counsel of one party to an act fully performed by opposing counsel, the power given to the attorney to bind his client by stipulation made under section 283 of the Code of Civil Procedure cannot be invoked as intended to work a fraud upon the opposite party. (Id.)
7. **MOTION TO CORRECT RECORD PENDING APPEAL—RESCISSION OF AMENDMENT.**—A motion made by a substituted attorney of the defendant pending his appeal, to correct the record by striking out from the complaint the words and figures allowed to be inserted therein at the trial by consent of defendant's former attorney given in open court, is in effect to rescind the former action of the court in allowing the amendment, to the prejudice of the plaintiff, without fault on his part being shown, and is properly denied. (Id.)
8. **NEGATIVE ALLEGATION—NONPAYMENT OF DEBT—BURDEN OF PROOF—SUPPORT OF FINDING.**—Negative allegations in a pleading need not be proved, unless they constitute an essential part of the original substantive cause of action. The allegation of nonpayment of a debt sued upon, though necessary to make the complaint perfect, need not be proved; but the burden of proof of payment is upon the defendant. Where the debt sued upon is proved within the statute of limitations, in the absence of proof of payment, a finding of the nonpayment alleged is sufficiently sustained. (*Melone v. Ruffino*, 514.)
9. **AVERMENT OF DAMAGE UNNECESSARY.**—In an action to enjoin the diversion of water from plaintiff's ditch, it is not necessary to aver that plaintiff has already sustained any damage, nor to state the amount thereof. (*Last Chance Water Ditch Co. v. Emigrant Ditch Co.*, 277.)

See *Bona Fide Purchaser*, 1; *Contract*, 8, 12; *Corporations*, 2-7; *Divorce*, 1; *Findings*, 1, 4; *Guardian and Ward*, 5; *Injunction*, 4, 5, 13; *Insolvency*, 3, 4; *Irrigation District*, 1, 2; *Malicious Prosecution*, 2, 3; *Mortgage*, 5, 6, 9, 13, 15, 16; *Municipal Corporations*, 1; *Partnership*, 1, 7; *Receiver*, 8, 11; *Taxation*, 3.

POLICE POWER. See *Sanitary District*.

PRACTICE.

1. **SETTING ASIDE JUDGMENT BY DEFAULT—NONRECEIPT OF NOTICE OF OVERRULING OF DEMURRER.**—Where a firm of attorneys had appeared for the defendant and demurred to the complaint, and

PRACTICE (Continued).

notice of the overruling of the demurrer had been mailed to one of the members of the firm, if such member makes an uncontradicted affidavit that neither he nor the firm received the notice alleged to have been mailed to him, and that neither he nor the firm knew that the court had passed upon the demurrer until one week before notice was given of a motion to set aside a judgment by default taken against the defendant, the motion to set it aside and should be granted. (*Clark v. Oyharzabal*, 328.)

2. **SETTING ASIDE JUDGMENT—FAILURE TO ATTEND TRIAL—MISTAKE AND EXCUSABLE NEGLECT—ABUSE OF DISCRETION—REVERSAL UPON APPEAL.**—Where it is made to appear that the failure of the defendant to be represented at the trial was owing to the mistake and excusable neglect of his attorneys, who were misled as the result of reasonable inquiries, the exercise of the discretion of the court requires it to set aside the judgment for the plaintiff; and its action in refusing to do so is an abuse of discretion, and will be reversed upon appeal. (*Melde v. Reynolds*, 308.)
3. **CONSTRUCTION OF CODE—REMEDIAL PROVISION.**—Section 473 of the Code of Civil Procedure, which provides that "the court may, in its discretion, after notice to the adverse party, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceedings taken against him through his mistake, inadvertence, surprise, or excusable neglect," is remedial, and is to be liberally construed, under section 4 of the same code, with a view to effect its objects and promote justice. It is best observed by disposing of causes on their substantial merits, rather than with strict regard to technical rules of procedure. (*Id.*)
4. **EXERCISE OF DISCRETION OF COURT.**—The discretion of the court, under section 473 of the Code of Civil Procedure, ought always to be exercised in conformity with the spirit of the law, and so as to subserve, rather than impede or defeat, the ends of justice, regarding mere technicalities as obstacles to be avoided, rather than as principles to be made effective in derogation of substantial right. (*Id.*)
5. **RIGHTS OF PLAINTIFF—COMPENSATION FOR DAMAGE.**—The plaintiff, though not in any respect chargeable with the failure of the defendant to be represented at the trial, and though his attorneys made all reasonable efforts to secure the representation of the defendant before proceeding with the trial, cannot claim the right to enforce the judgment rendered in his favor through the mistake and excusable neglect of the defendant; but he has the right to be compensated for the damage actually sustained by him at the hands of the defendant. (*Id.*)
6. **AFFIDAVIT OF MERITS BY ATTORNEY—VERIFIED ANSWER—WAIVER OF OBJECTION.**—The fact that an affidavit of merits was made by defendant's attorney in the excusable absence of the defendant from

PRACTICE (Continued).

the state is not ground for sustaining an order refusing to vacate the judgment, where it appears that the verified answer of the defendant contradicting all the averments of the complaint was on file before the trial, and where it does not appear that any objection upon that ground was made in the court below, and the motion was not denied upon that ground. (Id.)

7. **PERSONAL AFFIDAVIT OF MERITS NOT JURISDICTIONAL**.—An affidavit of merits by the defendant himself in person is not a jurisdictional requisite for granting relief under section 473 of the Code of Civil Procedure, and may be dispensed with, if the court is otherwise satisfied that the application is meritorious, and is made in good faith, and not for delay. The verified answer of the defendant on file may be considered by the court in determining the question of merits and good faith, as well as the affidavit of his attorney. (Id.)
8. **FURTHER AFFIDAVIT—OBJECTION OF PLAINTIFF—CONTINUANCE OF HEARING**.—If the court deems a further affidavit necessary, or the plaintiff should object to the application for want of a personal affidavit of merits by the defendant, it should continue the hearing a sufficient time to enable it to be procured. (Id.)
9. **DISMISSAL OF ACTION—WANT OF PROSECUTION—DISCRETION**.—Where an action to set aside a judgment and to obtain a new trial was commenced in 1890, and a demurrer was sustained to the complaint in 1894, and no proceeding was had thereafter by the plaintiff until 1897, when an amended complaint was filed, the court had discretion to dismiss it for want of prosecution. (San Jose Land, etc. Co. v. Allen, 247.)
10. **ABSENCE OF NOTICE OF ORDER SUSTAINING DEMURRER—DUTY OF PLAINTIFF**.—The absence of notice given by the defendant to the plaintiff of the order sustaining the demurrer to the complaint and granting leave to amend, and the effect of such absence upon the running of the time in which to amend, under section 476 of the Code of Civil Procedure, cannot affect the right of the defendant to move for a dismissal for plaintiff's failure to prosecute the case or excuse plaintiff's laches. It was the duty of the plaintiff to see that the demurrer was determined, so that the action could go forward. (Id.)
11. **ORDER GRANTING LEAVE TO AMEND—ESTOPPEL—RIGHTS OF DEFENDANTS**.—The court was not precluded from exercising its discretion on the motion of defendants to dismiss the case for want of prosecution, because it had shortly before given plaintiff leave to amend. The rights of the defendants could not be cut off by such leave alone. (Id.)
12. **RULING UPON DEMURRER—REVERSAL UPON APPEAL—RIGHTS OF PARTIES—LEAVE TO AMEND—ORDERS FOR DISMISSAL WITHOUT PREJUDICE**.—Upon the reversal of a judgment for an erroneous overruling of a demurrer to the complaint, the parties are restored to their

PRACTICE (Continued).

original rights, and upon the sustaining of the demurrer with leave to amend, the plaintiff, instead of amending, may apply to the court for leave to dismiss the action without prejudice, and the court may order such dismissal. (Richards & Knox v. Bradley, 670.)

13. **POWER OF COURT—CONSTRUCTION OF CODE—PROVISION FOR CLERK'S DISMISSAL NOT MANDATORY OR EXCLUSIVE.**—The provision for the dismissal of an action under subdivision 1 of section 581 of the Code of Civil Procedure by request of the plaintiff to the clerk is not mandatory or exclusive of the power of the court to grant an order of dismissal, which, when procured by the plaintiff, should be noted by the clerk in the register of actions. (Id.)

See Appeal; Attachment; Bill of Exceptions; Costs; Evidence; Findings; Insane Persons; Judge; Judgment; New Trial; Place of Trial; Pleading; Writ of Assistance.

PRE-EMPTION. See Public Lands.

PRINCIPAL AND AGENT. See Agency.

PROBATE LAW. See Estates of Deceased Persons.

PROHIBITION. See Injunction, 10; Judge, 2; Receiver, 4.

PROMISSORY NOTE. See Negotiable Instruments.

PUBLIC LANDS.

1. **RAILROAD GRANTS—VOID PURCHASE.**—The grant of lands to the Atlantic and Pacific Railroad Company had the effect to withdraw the land granted from other disposition, while that grant remained operative, both within the primary and indemnity limits, and the Southern Pacific Railroad Company acquired no right to any of said lands under its grant, and any purchase therefrom is void. (San Jose Land etc. Co. v. San Jose Ranch Co., 673.)
2. **RESTORATION OF LANDS TO PUBLIC DOMAIN—CONFIRMATION OF WATER RIGHTS.**—The restoration to the public domain by the act of Congress of 1886 of the lands granted to the Atlantic and Pacific Railroad Company by the act of Congress of 1866 operated to confirm existing water rights previously acquired by appropriation in 1870, without objection from that railroad company, and it seems that such confirmation made such water rights valid from their inception. (Id.)
3. **ACT TO RELIEVE PURCHASERS OF FORFEITED LANDS—PRE-EMPTION RIGHT—SUBORDINATION TO PREVIOUS WATER RIGHTS.**—The pre-emption right conferred by section 5 of the act of Congress of March 3, 1887, to relieve *bona fide* purchasers of forfeited lands, upon purchasers to whom they have been improperly sold by any company

PUBLIC LANDS (Continued).

as part of its grant, when not included therein, is subordinated to rights of way and ditch and water rights appearing to have been acquired in good faith under the laws of the United States prior to that act, and even prior to the inception of the grant under claim of which the improper sale was made. (Id.)

4. ACTION TO QUIET TITLE—FINDINGS AGAINST PLAINTIFF'S TITLE—UNEXERCISED RIGHT OF PRE-EMPTION—OMISSIONS TO FIND AS TO DEFENDANT'S WATER RIGHT.—In an action to quiet title to land against an adverse claimant of a water right, where it appears that plaintiff had no other title or right than the pre-emption right conferred by the act of 1887, and that such right had not been exercised, and there had been no expression of an intent to exercise it, and that the plaintiff was not in possession of the land, and had never had more than a temporary possession of part thereof, the place and extent of which was not shown, a finding that plaintiff is not the owner of the land is sustained, and a judgment for the defendant for costs is supported, and it is immaterial that there is no finding or judgment as to the defendant's title to the water right where defendant does not appeal or complain of the judgment. (Id.)

PUBLIC OFFICERS. See Office and Officers.

PUBLIC POLICY. See Divorce, 6. 7.

QUIETING TITLE. See Bona Fide Purchaser, 1; Pleading, 1; Public Lands, 4.

QUO WARRANTO. See Office and Officers, 8.

RAILROAD. See Eminent Domain; Public Lands; Street Railroad.

RAPE. See Criminal Law, 2-3.

RECEIVER.

1. INSOLVENT CORPORATION—APPOINTMENT OF RECEIVER—JURISDICTION OF EQUITY—CONSTRUCTION OF CODE.—A court of equity has no inherent power to appoint a receiver of an insolvent corporation merely because of its insolvency, or to wind up its affairs, in the absence of a statutory provision. Section 565 of the Code of Civil Procedure provides only for the appointment of a receiver upon the dissolution of a corporation; and subdivision 5 of section 564 of the same code does not contemplate the appointment of a receiver of an insolvent corporation in an action brought merely for that purpose, but only as ancillary to an action instituted against the insolvent corporation by some one authorized by law to commence it. (Murray v. Superior Court, 628.)

RECEIVER (Continued).

2. **RECEIVER OF LIFE INSURANCE COMPANY—ACTION BY MEMBER—INSUFFICIENT SHOWING—WANT OF JURISDICTION.**—The superior court has no jurisdiction to appoint a receiver of a life insurance company organized on the assessment plan under the act of 1891 (Stats. 1891, p. 126), and to take its assets from the control of its directors, at suit of a member thereof, on the alleged ground that its total liabilities exceed its assets, that nearly one-half of its assets are due on policies to deceased members, that the directors have transferred outstanding policies to another company and have ceased to issue policies, and that salaries and expenses are wasting the assets, where there is no showing of fraud or mismanagement, or that the corporation has been dissolved, or has been adjudged insolvent, or has forfeited its right to do business under the act of 1891. (Id.)
3. **CONSTRUCTION OF ACT OF 1891—RESTRAINT OF INSURANCE CORPORATION FROM DOING BUSINESS—REPORT OF INSURANCE COMMISSIONER—ACTION BY ATTORNEY GENERAL.**—Though it was not the intent of the legislature that corporations organized under the act of 1891 should be exempt from all laws, rules, or decisions under the general laws of the state, yet that act provides a complete remedy by which the corporation may be restrained from doing business, through the machinery provided in section 10 thereof, by proceedings instituted by the attorney general, upon an adverse report of the insurance commissioner after examination into the affairs of the corporation. There is no other method provided in the act by which the authority of the corporation to do business can be revoked. (Id.)
4. **VOID APPOINTMENT OF RECEIVER—PROHIBITION—APPLICATION BY JUDGMENT CREDITOR OF CORPORATION.**—A writ of prohibition will issue to restrain the superior court from maintaining possession of the assets of an insurance corporation by a receiver whose appointment is void, as being in excess of the jurisdiction of the court, upon application of a creditor of the corporation who has obtained judgment against it, and who has levied an execution upon moneys, credits, and personal property held by the receiver. (Id.)
5. **COMPENSATION FROM FUND—EXCEPTIONS TO RULE—PERSONAL LIABILITY OF PARTIES.**—As a general rule, the compensation of a receiver is primarily a charge upon the fund in his possession, and is to be paid out of that fund; but if he has gained the possession of the fund through an irregular, unauthorized appointment, or if the property taken is determined to belong to third parties, and is taken from his possession by paramount authority, or if the fund is from any cause insufficient for his remuneration, he must look for his compensation to the party or parties at whose instance he was appointed, and is entitled to hold them personally liable for the unpaid portion of the amount

RECEIVER (Continued).

- of compensation fixed by the court. (*Ephraim v. Pacific Bank*, 589.)
6. **RECEIVERSHIP OF PROPERTY SUBJECT TO MORTGAGE—SURPLUS—LOSS OF TITLE—INSUFFICIENCY OF FUND.**—A receiver of property subject to a mortgage in favor of one not a party to the action holds it subject to any judgment which may be rendered in an action to foreclose the mortgage; and the right of the receiver attaches only to the surplus, if there be any arising from the sale of the property. If there is no surplus, and the title is lost as the result of the foreclosure, there is a total insufficiency of the fund, which authorizes the receiver to look for his compensation to the parties at whose instance he was appointed. (*Id.*)
7. **ORDER SETTLING RECEIVER'S ACCOUNT—EXPRESSION OF LIABILITY—DISMISSAL BY PLAINTIFFS—ACTION BY RECEIVER.**—It is not necessary that the order settling the receiver's account should determine or express what party is personally liable to him for the expenses and compensation allowed therein; and where the property possessed by the receiver was lost as the result of the foreclosure of a mortgage, and the action in which he was appointed was thereafter dismissed by the plaintiffs at whose instance he was appointed, so that no personal judgment could be rendered against them in favor of the receiver, he may, after the settlement of his account, maintain an action against them. (*Id.*)
8. **PLEADING—LIABILITY OF OTHER PARTIES—MATTER OF DEFENSE—JUDGMENT UPON DEMURRER.**—If the plaintiffs sued by the receiver would claim that the defendants in the original action were liable to the receiver as well as themselves, it is matter of defense to be pleaded by them. Where a demurrer to the complaint was sustained without any plea of nonjoinder of parties, and final judgment was passed thereupon, the question is not presented. (*Id.*)
9. **ADMISSION—COMPULSORY SURRENDER OF POSSESSION BY RECEIVER—RIGHT OF ACTION.**—The general demurrer admitted the fact alleged that the receiver "was obliged to and did turn over the possession of the property to said purchaser" under the foreclosure sale; and it cannot be urged under the complaint that by surrendering possession instead of retaining it to enforce his claim the receiver lost his right of action. (*Id.*)
10. **ACTION AGAINST INSOLVENT BANK—JOINDER OF TRUSTEES.**—The trustees and directors of an insolvent bank are properly joined as parties codefendant with the bank in an action by a receiver to recover the compensation fixed by the court in a former action, where the complaint of the receiver alleges that he was appointed upon the petition of the plaintiffs in the former action by the insolvent bank and others, and that it was commenced by the parties who were settling the affairs of the bank in liquidation, and that the defendants other than the bank are the trustees and directors of the corporation defendant, and as such have the custody and control of its funds and assets. (*Id.*)

RECEIVER (Continued).

11. **CONSTRUCTION OF PLEADING—BANK COMMISSIONERS' ACT—REQUEST OF TRUSTEES AND DIRECTORS FOR APPOINTMENT.**—The complaint of the receiver is to be construed in the light of the provisions of the bank commissioners' act and as averring in effect that he was appointed at the instance and request of the trustees and directors codefendants, as well as of the bank defendant. (Id.)
12. **PURPOSE OF JOINDER OF TRUSTEES.**—Under the facts alleged the trustees of the insolvent bank were properly joined as trustees, not only that they may defend the funds of the bank against any unjust claim, but also that it may be determined whether the claim of the plaintiff is a preferred claim, and chargeable against the funds of the bank in their custody. (Id.)
13. **STATUTE OF LIMITATIONS—SETTLEMENT OF ACCOUNT—APPEAL.**—The statute of limitations against the action of the receiver to recover his compensation did not begin to run until his account was settled and allowed; and for the time during which an appeal from the order of allowance was pending, the running of the statute was suspended. (Id.)
14. **FORECLOSURE OF MORTGAGE—RECEIVER OF RENTS AND PROFITS—STIPULATION IN MORTGAGE—JURISDICTION—VOID APPOINTMENT.**—In an action to foreclose a mortgage, the court has no jurisdiction to appoint a receiver of the rents and profits of the mortgaged property, based merely upon a stipulation in the mortgage for such appointment in case of default and foreclosure, without any showing of facts warranting the appointment under section 564 of the Code of Civil Procedure; and an appointment so made is void. (Baker v. Varney, 564.)
15. **POWER OF COURT LIMITED—CONSENT INEFFECTUAL.**—The power of the court to appoint a receiver in an action of foreclosure is limited to the cases provided for in section 564 of the Code of Civil Procedure; and in a case where the court has no authority under the statute to appoint a receiver such authority cannot be conferred by consent or stipulation of the parties. (Id.)

RECLAMATION DISTRICT.

1. **ASSESSMENT NOT PROTECTED TO BENEFITS.**—An assessment by a reclamation district must be made in proportion to the benefits which will result to the land assessed from the works upon which the money raised thereby is to be expended. An assessment of all the reclaimable lands of the district equally for the construction and maintenance of works, which cannot result in the reclamation of more than one-half of the lands of the district, is unjust, and

RECLAMATION DISTRICT (Continued).

not permissible under the reclamation law. (Reclamation Dist. No. 108 v. West, 622.)

2. "BENEFITS" TO BE CONSIDERED.—The "benefits" which are to be taken into account by the commissioners in apportioning the charge or assessment are those benefits only which spring from the system of works which such assessment is levied to construct or maintain. (Id.)
3. APPORTIONMENT OF BENEFITS FROM LEVEE—PROTECTION OF PART OF DISTRICT—PROSPECTIVE WORKS ELSEWHERE.—In apportioning the benefits to result from the construction and maintenance of a levee along a river, which has effected the reclamation of part only of the lands of the district, prospective benefits to be derived from another prospective system of works necessary to be constructed elsewhere in the future to protect the remainder of the reclaimable lands from overflow of waters from the hills cannot be considered, notwithstanding the levee system is beneficial, when taken in connection with such prospective system of works, to reclaim such lands. [McFarland, J., dissenting.] (Id.)

See Swamp and Overflowed Land.

REFORMATION.

SUBSTITUTION OF PARTIES TO CONTRACT.—A court of equity in the exercise of its jurisdiction to reform written contract, has no power to make a new contract. It can neither add additional parties to nor substitute other parties for those already appearing upon the face of the writing. (Mabb v. Merriam, 663.)

See Vendor and Vendee, 1.

RELIGIOUS ASSOCIATION. See Church.

RESCISSION. See Contract, 3, 4; Fraud, 2, 3, 5; Sale, 10; Vendor and Vendee.

ROADS AND HIGHWAYS. See Streets, Roads, and Highways.

SALE.

1. PROMISE BY PURCHASER TO PAY INDEBTEDNESS—CONSIDERATION—DAMAGES FOR BREACH—ACTION BY VENDOR—RESCISSION—PAYMENT.—A promise made by the defendant to the plaintiff, upon a sale and delivery to them by the plaintiff of a half-interest in a saloon, to pay all indebtedness previously incurred in the business by plaintiff and one of the defendants to an amount specified, is part of the consideration of the transfer, and the vendor may recover the full amount of the indebtedness as damages for its breach, without being required to rescind the contract of sale, and without having first paid the indebtedness himself. The damages are the same, whether the plaintiff has already paid the credi-

SALE (Continued).

tors or must yet inevitably pay them. (*Meyer v. Parsons*, 653.)

2. **EXTENT OF RECOVERY—POSSIBILITY OF NONEXACTION.**—The extent of the plaintiff's recovery in the full amount of the indebtedness as damages is not affected by the possibility that the creditors may not exact all that they are entitled to in discharge of their claims. The extent of the liability of the defendants to the plaintiff is the full amount agreed to be paid for the property. (Id.)
3. **LIABILITY OF NEW PARTY TO CREDITORS IMMATERIAL.**—Whether the defendant who came into the business as a new party and promised to pay the creditors is liable to the creditors or not, and whether he can be protected except as to costs by paying the creditors, or cannot be so protected, the position in which he is placed by his contract with plaintiff is to be deemed his own fault, and should not prevent the court from giving to the plaintiff the benefit of the contract between them where there has been no novation thereof. (Id.)
4. **PROMISE TO PAY INDEBTEDNESS OF OTHERS—STATUTE OF FRAUDS—CONTRACT OF SALE.**—The promise of such defendant to pay the indebtedness of the plaintiff and his codefendant which entered into a contract of sale, accompanied by the delivery of the property, is not a promise to answer for the debt or default of another within the statute of frauds. (Id.)
5. **INSTRUCTIONS—OMISSION OF QUESTION OF PARTNERSHIP.**—Where one of the defendants who had been in the saloon business with the plaintiff had made default upon the trial of issues joined by the other defendant, instructions given are not objectionable upon the ground that allusion to the defaulting defendant, and the question of partnership relation between him and the plaintiff, or between him and the defendant, are ignored and omitted. (Id.)
6. **HARMLESS INSTRUCTION AGAINST LIABILITY TO CREDITORS.**—An instruction to the effect that the creditors could not hold the defendant liable against whom the case was tried, whether sound or not, is harmless, and could not be prejudicial to the defendant. (Id.)
7. **EVIDENCE—VALUE AND AMOUNT OF STOCK IN SALOON.**—The value or amount of the stock in the saloon at any other time than when the sale was made is not relevant to the matter in issue, and evidence thereof is inadmissible. (Id.)
8. **IMMATERIAL UNCERTAINTY IN VERDICT—INTEREST ON NOTE—MATTER WITHOUT DEFENSE.**—An uncertainty in the verdict as to the matter of interest on a note, in respect to which there was no defense, is immaterial. (Id.)

SALE (Continued).

9. **SUBSEQUENT ASSUMPTION OF LIABILITY BETWEEN DEFENDANTS IMMATERIAL.**—Where the evidence clearly proves that both of the defendants assumed to pay the debts for which the plaintiff was liable in consideration of the sale to them of his interest in the saloon, evidence of any subsequent agreement or assumption of liability as between the defendants, upon a sale from one of them to the other, is immaterial, and is properly rejected. (Id.)

10. **SALE AND EXCHANGE OF MACHINES—FALSE REPRESENTATIONS—RESCISSION—CANCELLATION—JUDGMENT FOR VALUE.**—In an action to enforce the rescission of a contract for the exchange of street sweeping machines and a written obligation of plaintiff to pay an agreed difference, upon the ground of false and fraudulent representations made by the defendant, specifically alleged in the complaint, and found by the court to have been made, and to have induced the contract, where it appeared that the defendant had taken possession of the machine delivered by him, and refused to return the written obligation, or plaintiff's machine, the value of which was alleged in the complaint, the court may render judgment for the plaintiff canceling the obligation and for the recovery of the value of his machine, instead of for its possession as prayed for, evidence and a finding upon the subject of such value being within the case made by the complaint, and within the issue. (*Stewart v. Hollingsworth*, 177.)

11. **CROSS-COMPLAINT—CONDITIONAL SALE—RETAIING POSSESSION—CREDIT FOR PRICE—FINDINGS—LOSS OF CLAIM.**—Under a cross-complaint averring that by the terms of the sale to the plaintiff the title to the machine was to remain in defendant until fully paid for, and that he took possession for default in payment, and resold it for plaintiff's account, and also that the machine was by the agreement to be held by plaintiff as security for payment of the price to the defendant, findings which show that the latter averment is untrue, and that the contract to pay the price was obtained by fraud and false representations, as alleged in the complaint, establish that defendant had no further claim for the price when he took possession of the machine. Such cross-complaint is covered by the complaint and the findings made by the court. (Id.)

12. **HARVESTER—CHANGE OF TITLE—LATER CONDITIONAL SALE—TITLE OF SUBSEQUENT VENDEE.**—Where a harvester was sold and delivered to the purchaser, under an agreement to give notes for the purchase money, and under the terms of an absolute sale passing title to the purchaser, the sale cannot be afterward converted into a conditional sale, without any change of possession by a mere written agreement between the parties, so as to affect the title of a subsequent vendee of the purchaser to whom the possession was de-

SALE (Continued).

livered. (Houser & Haynes Mfg. Co. v. Hargrove, 90.)

13. **CONDITIONAL SALES NOT FAVORED.**—Conditional sales intended as security, in lieu of a chattel mortgage upon the property, are not favored; and, by reason of the opportunities for fraud presented by such defendants, courts are inclined to scrutinize them closely. (Id.)
14. **TAX TITLE—VALIDITY OF ASSESSMENT.**—Taxes were properly assessed to the original purchaser of such harvester, while in his possession and control, with *indicia* of ownership invested under the original purchase thereof; and the addition of other names on the assessment-roll did not invalidate the assessment to him. The taxes being delinquent, the assessor's sale of the harvester to the highest bidder passed title to such bidder, irrespective of the amount of the delinquent tax. (Id.)
15. **AUTHORIZATION FOR SALE OF LAND—CERTAINTY OF DESCRIPTION—ABBREVIATIONS—REFERENCE TO ATTACHED DIAGRAM.**—The use of abbreviations in the description of land contained in an authorization for its sale by real estate agents does not render the authorization void for uncertainty, where the abbreviations are intelligible and easily understood by the aid of a diagram attached to the document. (Melone v. Ruffino, 514.)
16. **VARIANCE—DESCRIPTION IN INDORSED RECEIPT—UNDERSTANDING OF PARTIES—ACTION FOR RETURN OF DEPOSIT.**—A variance between the description in the authorization and that contained in the printed receipt indorsed on the back thereof is not fatal, where both refer to the attached diagram, and it is clear that all parties had reference to the same property. Where it was plainly agreed that if the title was not made good, the deposit made with the agents by the proposed purchaser should be returned to him, such variance will not affect an action to enforce the return of the deposit for failure of the owners to make the title good. (Id.)
17. **SALE AUTHORIZED BY ADMINISTRATOR—EVIDENCE—REPRESENTATIVE CAPACITY—HARMLESS ERROR.**—Where a sale was authorized by an administrator to be negotiated by real estate agents, in an action by a proposed purchaser to recover back the money deposited by him with such agents, evidence is admissible for the defendant to show that he was acting in his representative capacity, and that all parties so understood the fact to be; but error in excluding such evidence is harmless, where it subsequently appears in proof that he acted in his capacity as administrator of the estate, and was endeavoring to dispose of some of its property for the benefit of himself and other heirs. (Id.)
18. **PERSONAL LIABILITY OF ADMINISTRATOR—SCRIPTIO PERSONAE.**—One who, in authorizing a sale of real estate, uses the first person in the body of the instrument, in fitting words to bind himself personally thereby, to which he appended his name, followed by

SALE (Continued).

the designation of himself as administrator of the estate of a deceased person named, is personally liable upon the contract, notwithstanding the description of his person and representative capacity so appended to his signature. (Id.)

19. **VALIDITY OF CONTRACT—LIABILITY FOR DEPOSIT.**—There is nothing unlawful in an administrator binding himself personally by a contract to sell the property of the estate in good faith for the benefit of himself and other heirs; and though he may not be able to make a title by the decree of the court within the time limited, he may bind himself personally by a valid agreement for the return of the deposit made by his authority. (Id.)

20. **CREATION OF AGENCY—LIABILITY OF PRINCIPAL.**—Where there was no provision in the written terms of the authorization to the real estate agents for a sale on their own account, or for compensation of any price obtained over a fixed sum, an agency is thereby created, and the principal is bound by the contract made by the agents under such authorization for a return of a deposit made by a proposed purchaser, in case of failure of the principal to make title, as agreed. (Id.)

21. **STATUTE OF LIMITATIONS—ACTION TO RECOVER DEPOSIT—WRITTEN CONTRACT.**—The written contract being valid and personally binding upon the administrator, an action to recover the deposit agreed by its terms to be returned in case of failure to make title as agreed is not based upon an implied contract, nor affected by the two years' statute of limitations, and is not barred until the lapse of four years from the accrual of the cause of action. (Id.)

See Assignment; Attachment, 1; Broker; Vendor and Vendee.

SANITARY DISTRICT.

1. **AMENDATORY STATUTE—CONSTITUTIONAL LAW—TITLE OF ACT—POLICE POWER—VOID LIQUOR ORDINANCE.**—The amendment of 1895 (Stats. 1895, p. 8) to the act of 1891 (Stats. 1891, p. 223), entitled "An act to provide for the formation, government, operation, and dissolution of sanitary districts in any part of the state, for the construction of sewers, and other sanitary purposes," by which sanitary boards were given additional power "to determine the qualification of persons authorized to sell liquors at retail," and by which licenses to keep or sell liquors at retail were not allowed to take effect within the district without the approval of the sanitary board, is unconstitutional and void, as not being embraced within the title of the original act, and as not being within article XI of the constitution granting local police power to counties, cities, towns, and townships; and a liquor ordinance of a sanitary district based upon such amendment is without authority of law and void. (In re Werner, 567.)

SANITARY DISTRICT (Continued).

2. **PUBLIC CORPORATIONS NOT MUNICIPAL—POWER OF LEGISLATURE—CONSTRUCTION OF CONSTITUTION—MAXIM.**—Sanitary districts, like irrigation and reclamation districts, are public corporations, not municipal; and the legislature has no power to graft upon them a subject foreign to the purposes of the act creating them, and which falls within the police power possessed by municipalities organized for governmental purposes. Under the maxim of construction, *Expressio unius est exclusio alterius*, the legislature cannot clothe a public corporation not municipal with the local governmental powers conferred by the constitution upon counties, cities, towns, and townships. (Id.)
3. **PENAL LEGISLATION BY SANITARY DISTRICT.**—It seems that the legislature cannot delegate to a sanitary district the power of enacting penal legislation of any kind. [Per McFarland, J.] (Id.)

SCHOOLS.

1. **TAXATION—SUPPORT OF HIGH SCHOOL—ESTIMATE BY HIGH SCHOOL BOARD—POWER OF CITY TRUSTEES—CONSTRUCTION OF CODE.**—Under subdivisions 14 and 15 of section 1670 of the Political Code, providing that the high school board shall furnish to the authorities, whose duty it is to levy taxes, "an estimate of the amount of money required for conducting the school for the school year," and making it the duty of the board of trustees of a city, to whom the estimate is made, to levy a special tax "sufficient in amount to maintain the high school," the power or discretion is vested in the board of trustees as the taxing body to determine what amount will be sufficient for the purpose, and they are not concluded by the estimate made by the high school board. (Board of Education v. Board of Trustees, 599.)
2. **SUPPORT OF COMMON SCHOOLS—LEGISLATIVE POWER OF TRUSTEES—MUNICIPAL CORPORATIONS ACT—DIRECTORY STATUTE.**—Subdivision 8 of section 798 of the municipal corporations act, providing that the board of trustees is to add to the levy of taxes for city purposes "the amount so found [by the board of education] to be required," is to be construed as directory only, and as not restricting the legislative functions of the board of trustees of the municipality to determine the amount of money to be raised by taxation for school and other municipal purposes. (Id.)
3. **CONSTRUCTION OF CONSTITUTION—MAXIM—POWER OF TAXATION BY "CORPORATE AUTHORITIES."**—Under article XI, section 12, of the constitution of this state, providing that "the legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes," the words

SCHOOLS (Continued).

"corporate authorities thereof" are to be construed distributively—*reddendo singula singulis*—as referring to the governing body of each of the several municipalities and *quasi* municipalities referred to in the section, and as importing the legislative department of the municipality only, in which is intended to be vested the legislative power of taxation for all municipal purposes. (Id.)

4. **SCHOOL DISTRICTS—CLASSES DISTINGUISHED—QUASI MUNICIPALITIES UNDER CODE—QUERY.**—Under the municipal corporations act, in cities of the first five classes, the educational department has no legislative power, but that is vested in the legislative council or board of trustees of the city; but all other cases are governed by the political Code under which the city territory with its inhabitants constitutes a school district, which is a public corporation, or *quasi* municipality, governed by "boards of education," having the same functions as the "boards of trustees" of country school districts. Whether this distinction of classes is constitutionally valid is a question suggested, but not decided. (Id.)

See Assignment, 5-8; Bonds; Injunction, 9.

SEAL. See Contract, 14, 15.

SPECIFIC PERFORMANCE.

1. **INADEQUACY OF CONSIDERATION.**—Under section 3391 of the Code of Civil Procedure, inadequacy of consideration is made a distinct ground for refusing a specific performance of a contract, independently of the question whether it amounts to evidence of fraud. (Newman v. Freitas, 283.)
2. **CONTINGENT FEE OF ATTORNEY IN DIVORCE SUIT—SHARE OF COMMUNITY PROPERTY—INADEQUATE CONSIDERATION—REASONABLE COMPENSATION.**—A contract for a contingent fee of an attorney in a divorce suit, giving one-third interest in the share of community property recovered by the wife as plaintiff, cannot be specifically enforced, where it appears that the plaintiff did not receive adequate consideration for her promise, and that the attorney received, by order of the court in the divorce suit, a reasonable compensation for all the services performed by him. (Id.)
3. **PRESUMPTION FROM ALLOWANCE BY ORDER OF COURT—KNOWLEDGE OF CONTRACT—INVALIDITY.**—It must be presumed from the allowance made for the services of the attorney for the plaintiff in the divorce suit, by order of the court, with knowledge of the written contract for a contingent fee, that the court deemed the contract illegal and void, and made the allowance as if no contract had existed. Otherwise, the allowance could not be justified. (Id.)
4. **JUSTICE AND REASONABLENESS OF CONTRACT—RULES OF EQUITY.**—Under section 3391 of the Civil Code, specific performance

SPECIFIC PERFORMANCE (Continued).

cannot be enforced against a party to a contract "if it is not as to him just and reasonable." Under the settled rules of equity, specific performance cannot be decreed unless it affirmatively appears that the contract is fair, just, and equal in all of its parts, and reasonable and equal in its operation; and if it is in any respect unfair or oppressive, the plaintiff will be left to his remedy at law. (Id.)

STATUTES.

STATUTORY CONSTRUCTION—REASON AND INTERVENTION OF LAW CONTROLLING LETTER.—A statute may be construed contrary to its literal meaning when a literal construction would result in an absurdity or inconsistency; and the reason and intention of the lawgiver will control the strict letter of the law when to adhere to the strict letter would lead to injustice or absurdity. (*Carp v. Dowdell*, 244.)

STATUTE OF FRAUD. See *Sale*, 4.

STATUTE OF LIMITATIONS.

1. FORECLOSURE OF MORTGAGE—NEW PROMISE BEFORE BAR OF STATUTE—ASSUMPTION OF MORTGAGE BY VENDEE—ENFORCEMENT IN EQUITY.—The agreement of the vendee of a mortgage, or of his successor in interest, to assume and pay the mortgage, operates as an agreement to pay the note secured thereby; and where such agreement is made before the note is barred by the statute of limitations, it operates as a new promise continuing the note, and removing it from the operation of the statute as against the promisor, which begins to run as against him only from the date of the promise. Such promise may be enforced in equity by the mortgagee in the action to foreclose the mortgage; and he may treat the vendee as a principal debtor, and take judgment for deficiency against him. (*Daniels v. Johnson*, 415.)
2. CONTINUATION OF DEBT AND LIEN—MERGER—RENEWAL—EXTENSION—INAPPLICABLE PROVISION OF CODE.—In such case, there is a mere continuation of the liability upon the note for a longer term, which carries with it a continuation of the lien of the mortgage. There is no merger of the debt in a new contract, and no renewal or extension of the lien, nor any extinguishment thereof; but it is merely continued for the period during which the note, as continued, has to run. Section 2922 of the Civil Code is not applicable, where the statute of limitations has not fully run against the debt before the new promise is made. (Id.)
3. WRITTEN CONTRACT—REASONABLE TIME FOR DELIVERY OF WATER—ORAL AGREEMENT AS TO TIME.—An action founded upon the written contract between the parties for the delivery of water, construed as a contract to deliver it within a reasonable time, and interpreted

STATUTE OF LIMITATIONS (Continued).

under an admissible oral agreement of the parties, fixing a specified time as the limit for such delivery, is not barred by the provisions of section 337 of the Code of Civil Procedure, where the required delivery was less than four years before the commencement of the action. (*Richter v. Union Land etc. Co.*, 367.)

4. **LIMITATIONS INAPPLICABLE—FRAUD—OTHER RELIEF.**—Where no fraud is charged in the complaint, and the action is not for relief on the ground of fraud or mistake, but is based upon an obligation growing out of failure to perform a written contract, upon which no cause of action arose until within four years before the commencement of the suit, the limitations prescribed by subdivision 4 of section 339 and by section 343 of the Code of Civil Procedure are inapplicable. (*Id.*)
5. **ELECTION TO RESCIND CONTRACT AND RECOVER MONEY PAID—RUNNING OF STATUTE AS TO IMPLIED CONTRACT.**—The plaintiff had the election to treat the contract as still subsisting, notwithstanding any breach of it, and the limitation of subdivision 1 of section 339, referring to actions on contracts "not founded upon an instrument of writing," could not begin to run against an action to recover the purchase money for total failure of consideration of the contract until the plaintiff made his election to rely no longer upon the contract, and to sue for the money paid to the defendant under it. (*Id.*)

See *Eminent Domain*, 2, 3; *Guardian and Ward*, 3; *Irrigation District*, 1; *Receiver*, 13; *Sale*, 21.

STOCK AND STOCKHOLDERS. See *Contract*, 15-18; *Corporations*.

STREET ASSESSMENT.

1. **CONTRACT—AMOUNT OF WORK.**—A contract for a street improvement calling for less work than that proposed in the resolution of intention of the common council is void. (*Kutchin v. Engelbret*, 635.)
2. **SPECIAL PERMITS TO LOT OWNERS—RESOLUTION OF INTENTION—ASSESSMENT.**—The common council has no power, intermediate the passage of a resolution of intention to order a particularly described street improvement and the passage of the resolution ordering the work, to grant special permits to individual lot owners to do such portions of the work as are adjacent to their premises; and if it does so, a contract subsequently entered into to do the work in front of the lots of owners to whom special permits had not been granted, and an assessment therefor levied on such lots alone, are void. (*Id.*)
3. **PRIMA FACIE CASE—RECORD UPON APPEAL—AFFIDAVITS.**—Where there is nothing in the record upon appeal from a judgment enforcing

STREET ASSESSMENT (Continued).

a street assessment to overcome the *prima facie* case made by the introduction of the assessment, warrant, and accompanying documents, the judgment must be affirmed. Affidavits printed in the transcript which form no part of the record cannot be considered. (Warren & Malley v. Russell, 381.)

4. **FIXING OF GRADE—OUTSIDE CROSSING—CHANGE OF GRADE NOT APPARENT.**—The fact that the grade had not been fixed at a crossing outside of the work ordered to be done cannot affect the case; and where it does not appear that the official grade of the work ordered to be done had been fixed prior to the time mentioned in the complaint, no question arises as to a change of grade without a petition of the majority of those owning the land on the street. (Id.)
5. **PROTEST NOT MADE IN TIME—JURISDICTION.**—A protest not asserted within the ten days prescribed by the street law is of no consequence; and gives no jurisdiction to the board of supervisors to act thereupon. (Id.)
6. **NOTICE OF RESOLUTION BY STREET SUPERINTENDENT—OBSCURITIES—INSUFFICIENT RECORD UPON APPEAL—RESOLUTION NOT IDENTIFIED.**—Obscurities in a printed notice of resolution given by the street superintendent are not material if not evidently misleading; and where the resolution of intention involved in the case is not set forth in the record upon appeal, it does not appear that the obscure notice had reference to the resolution of intention under which the work was ordered. (Id.)
7. **ASSIGNABILITY OF CONTRACT—LIEN OF ASSIGNEE.**—The original contractors may assign the contract to others, who may do the work, and the lien follows the completion of the work by the assignee. (Id.)
8. **PROCEEDINGS IN INVITUM—COMPLIANCE WITH STATUTE ESSENTIAL.**—Proceedings upon which a street assessment are based are *in invitum*, and the statute must be substantially complied with, or the assessment will be void. (San Diego Inv. Co. v. Shaw, 273.)
9. **COST OF GRADING STREET—VOID ASSESSMENT UPON LOTS ON ONE SIDE OF STREET.**—The city authorities have no power to assess the entire cost of grading a street upon the lots on one side thereof if the street upon which the work was done was not a subdivision, street, avenue, or lane, and the work was not done opposite work of the same class already done; and such an assessment is void. (Id.)
10. **CONSTRUCTION OF STATUTE—LANDS FRONTING ON WORK.**—The provision of the statute that "the expenses incurred for any work authorized by this act . . . shall be assessed upon the lots and lands fronting thereon," means that the expense of the whole work authorized by the act in the improvement of a public street shall be assessed upon all of the lands fronting on the work, on both sides of the street, re-

STREET ASSESSMENT (Continued).

ardless of whether more of the work of grading is done on the one side of the street than on the other. The public improvement, when made, is equally for the benefit of each and every lot abutting on the street. (Id.)

11. **BURDEN OF PROOF—PRESUMPTION FROM DOCUMENTARY PROOF.**—In an action to foreclose the lien of a street assessment, evidence of the documents provided by the statute as *prima facie* evidence of the regularity and correctness of the assessment and of the prior proceedings throws the burden of proof upon the defendant. (Williams v. Bergin, 461.)
12. **PRESUMPTION NOT AFFECTED BY UNEXPLAINED DELAY—AFFIRMATIVE OF ISSUE.**—The presumption of the sufficiency and regularity of the proceeding arising from the statutory proof is not affected by the unexplained lapse of time for a period of three years between the date of the work and the date of the assessment. The affirmative of the issue still remains upon the defendant to show a defect in the proceedings. (Id.)
13. **TIME OF BID FOR WORK—PRESUMPTION.**—Where there is nothing to disclose that the bid for the work was not put in within the time provided in the advertisement for bids, it must be presumed that it was put in in time, though the bids were not opened and considered by the supervisors until after such time had elapsed. It must be presumed that official duty was regularly performed, as well as that all the proceedings were regular from the *prima facie* case made by the plaintiff. (Id.)
14. **BLANK BID—VOID CONTRACT—JURISDICTION OF SUPERVISORS.**—A blank bid omitting the name of the bidder is void. Such blank cannot constitute a bid; and no valid contract can be let thereupon to the persons who actually presented the blank bid. The supervisors have no jurisdiction to make a contract with one who is not a bidder. (Id.)
15. **BOND OF CONTRACTOR REFERRING TO BID—MISRECITAL—VOID BOND.**—A void bid is not rendered valid by a bond attached thereto signed by the contractors and their sureties, referring to and misreciting a bid or proposal made by them. The offer or bid must be in such form as to be binding upon its acceptance, otherwise the bond would be of no avail. (Id.)
16. **ABSENCE OF BID JURISDICTIONAL.**—The absence of a valid bid is jurisdictional, and is a defect which cannot be corrected upon appeal. (Id.)

STREETS, ROADS, AND HIGHWAYS.

1. **ROADS AND HIGHWAYS—CONDEMNATION OF LAND—JURISDICTION OF SUPERVISORS—RES ADJUDICATA.**—The jurisdiction of the supervisors to order proceedings by the county to condemn lands for a public road is conclusively established by a final decision upon a writ of

STREETS, ROADS, AND HIGHWAYS (Continued).

review, upon petition of the parties whose lands are condemned, establishing such jurisdiction. (Glenn County v. Johnston, 404.)

2. **APPEAL FROM JUDGMENT OF CONDEMNATION—IRREGULARITIES OF SUPERVISORS.**—Upon appeal from a judgment in such condemnation proceedings awarding a judgment for the value of the land taken and damages as assessed by the jury, mere irregularities or errors of the board not affecting its jurisdiction do not affect the judgment appealed from, and cannot be considered. (Id.)
3. **NONPAYMENT OF JUDGMENT AWARDED—ANNULMENT OF PROCEEDINGS.** Where more than thirty days have elapsed after the final judgment without the payment or deposit in court of the sum of money assessed by the verdict of the jury, in a proceeding brought by the county, upon order of the board of supervisors, to condemn the right of way for a road, the defendant is entitled, under sections 1251 and 1252 of the Code of Civil Procedure, to have the entire proceedings in the superior court vacated and annulled. (Id.)
4. **CONSTRUCTION OF CODE—APPLICABILITY TO MUNICIPAL CORPORATIONS—INABILITY TO ENFORCE PAYMENT.**—Sections 1251 and 1252 of the Code of Civil Procedure are general in their terms, and apply to all cases. The statute has made no distinction in favor of municipal corporations, but has made the right of the defendants to have the proceedings annulled depend upon the nonpayment of the sum assessed, and the inability of the defendants to enforce payment by execution. (Id.)
5. **ACTION FOR OBSTRUCTION OF HIGHWAY—EVIDENCE—PETITION AND PENCIL SLIP NOT PROVED.**—In an action to remove the defendant's fence from an alleged public highway, a document purporting to be a petition for a county road, which bears no date, and is not shown to have been on file or in the custody of anyone, and to which is adhesively attached a slip in pencil containing a description of the proposed road, without any evidence to show when it was attached or by whom it was written, is not admissible in evidence to show the formal laying out of the road. (Shepherd v. Turner, 530.)
6. **RECORD OF SUPERVISORS—FAILURE OF PROOF.**—A portion of the records of the board of supervisors appointing a petitioner to give notice to interested land holders to object to the laying out of a public road, and subsequently appointing viewers, and adopting their report, not shown to have been based upon any petition and proper proceedings appearing in the record, and not shown to have been made concerning the road in which the alleged obstruction exists, nor to be connected with the defendant or his grantors, is properly excluded as evidence relating to the formal laying out of the alleged road. (Id.)

STREETS, ROADS, AND HIGHWAYS (Continued).

7. **REPORT OF NOTICE OF ROAD—INADMISSIBLE EVIDENCE.**—A written report to the supervisors stating that the signer had given notice of a county road, specifically described, to all persons living along the line, and that he found them all in favor of the road, which was not under oath, and did not appear to be a public record, and did not show that the defendant or his grantors lived along the line of the proposed road, is not admissible in evidence for any purpose. (Id.)
8. **REFUSAL OF BOARD TO VACATE ROAD—PROCEEDINGS INADMISSIBLE.**—Proceedings of the board of supervisors upon a petition to vacate a public road, which included the premises upon which defendant had placed his fence, with which proceedings the defendant is not shown to have had any connection, have no tendency to prove the existence of a highway as against him, and are not admissible in evidence against him. (Id.)
9. **REPUTATION OF HIGHWAY—HEARSAY.**—Evidence is not admissible for the purpose of showing that the alleged road was generally spoken of and regarded by the people in the neighborhood as a public road. Hearsay evidence is not admissible to prove the existence of a highway; nor can its existence be proved by showing that it was generally reputed to be a highway. (Id.)
10. **USE OF ROAD—DEDICATION—DECLARATIONS.**—While it is competent to prove the use made of the road, and the extent of the use or travel over the road, for the purpose of showing a dedication or adverse user of the road under a claim of right, it is not competent to prove such user by the declarations of third parties. (Id.)

STREET RAILROAD.

1. **MUNICIPAL ORDINANCE—STREET FRANCHISE FOR RAILROAD—SINGLE OR DOUBLE TRACK—ELECTION—CONTINUED RIGHT—CONSTRUCTION OF ORDINANCE WITH STATUTE.**—A municipal ordinance granting the right of way to a railroad company over one of its streets, and requiring it to construct its track or tracks as near the center of the street as may be, is to be construed in connection with the statute under which the railroad company is incorporated, as providing for such use of the street, and for such single or double track as is authorized by the statute. In the absence of any express limitation in the ordinance requiring the immediate election of the use of a single or double track by the railroad company, the city council must be deemed to have granted the right of way with the privilege to the company to construct a single tract at the outset, and the continued right to construct an additional track in the future, whenever it should become desirable from the necessities or convenience of operating its road. (*Workman v. Southern Pacific R. R. Co.*, 536.)
2. **DETERMINATION OF NECESSITY—CONSTRUCTION OF STATUTE.**—Under a statute empowering the governing body of a city to grant "the use

STREET RAILROAD (Continued).

of any of the street or highways which may be absolutely necessary in order to enable any such company to reach an accessible point for a depot in any such . . . city, . . . or to pass through the same along as direct a route as possible and accommodate the traveling and commercial interests thereof," the city council is not required to determine in the first instance what use of the street is "absolutely necessary" for the company. The statute does not require the use to be designated in the ordinance; but it is sufficient to designate the street to be used, and it may be properly left to the determination of the railroad company what use thereof will be necessary for its business, which can only be determined as time and experience shall demonstrate. (Id.)

3. **ORDINANCE NOT A REVOCABLE LICENSE.**—An ordinance granting the right of way over a street to a railroad company, which contains no limitation of time for the completion of a double track, is not to be construed as a revocable license for such completion, on the ground that a single track was first completed and used under the ordinance. (Id.)
4. **IMMATERIAL FINDING—TITLE TO STREET IN FEE—APPELLANTS NOT INJURED.**—Where the city, which has appealed, is bound by the terms of its ordinance to allow a double track to be constructed upon its street, and the double track is constructed upon the opposite side of the street to that claimed in fee by a private party appellant, it is immaterial to either of the appellants whether a finding that the appellants have no title or interest in the land within the lines of the street is or is not sustained by the evidence. (Id.)
5. **STREET RAILWAY—COMMON USE OF STREET BY TWO LINES—CONSTRUCTION OF CODE—ORIGINAL EXPENSE—REASONABLE VALUE.**—Section 499 of the Civil Code, which provides for the joint use of part of the same street, not exceeding five blocks by two lines of street railway operated under different managements, "each paying an equal portion for the construction of the tracks and appurtenances used by them jointly," as applied prospectively to a case where no track has been constructed, leaves it to the lines to agree as to the construction thereof, the expense of which is to be equally borne; but the section also extends to a case where one line has already constructed and used its track, and another line seeks to use it under the statute, in which case the latter is not required to pay one-half the original expense of its construction, but only one-half of its reasonable value at the time of permission to use it. (Hook v. Los Angeles Ry. Co., 180.)
6. **PRESENT COST OF MATERIALS.**—Where the court allowed and required the payment by the new line of one-half of what would have been the present cost of the material used in the track and appurtenances at the time of its decree, in the absence of any other

STREET RAILROAD (Continued).

evidence of the reasonable value of the same at that time, the allowance of such cost is sufficient proof that that was its reasonable value. (Id.)

SURETIES. See Appeal, 21, 22; Bonds, 1.

SWAMP AND OVERFLOWED LAND.

1. SWAMP LAND FUND—PROPERTY OF STATE—DIVISION OF COUNTY—RECLAMATION DISTRICT IN NEW COUNTY—LEGISLATION—RIGHT OF PAYMENT.—Money paid into the treasury of a county to the credit of the swamp land fund is the property, not of the county, but of the state; and where the price of swamp lands in the county had been paid into that fund, and the county was thereafter divided, and the reclamation district for those lands was situated wholly in the new county, which had no part of the swamp land fund, and reclamation was there effected, new legislation is not required to warrant payment to the owners of such lands of their proportion of the swamp land fund of the old county. (California Pastoral etc. Co. v. Whitson, 376.)
2. STATUTORY CONSTRUCTION—STATEMENT BY REGISTER—LOCATION OF DISTRICT—PAYMENTS TO PURCHASERS.—Section 3477 of the Political Code, requiring the register of the state land office, upon receiving proper proofs of the reclamation of swamp lands, to credit each purchaser in the district with payment in full for such lands, and to forward "to the treasurer of the county in which any part of the district is situated, a statement showing the amount paid by each purchaser in the district," is to be construed with other provisions requiring the treasurer to divide the balance of the swamp land fund "*pro rata* among the original purchasers of land," and to "pay to each purchaser the amount found to be due," and the reference to the location of the district is not to be considered as standing in the way of the payment to the purchasers as required by law. The statement by the register is properly made to the treasurer of the county in which the lands of the district were situated when the payments for the swamp lands were made, and not to the treasurer of a new county in which the district is situated, which has no part of the swamp land fund. (Id.)
3. REFUSAL OF TREASURER OF OLD COUNTY—MANDAMUS.—Where the treasurer of the old county, after receiving from the register of the state land office the proper statement of payments made into its treasury by purchasers of swamp lands situated in the new county, the reclamation district of which was there located, refused to make any payment to the successor of the owners of the reclaimed lands, *mandamus* will lie to compel him to pay the amount found to be due to such owners out of the moneys in his hands to the credit of the swamp land fund of the county. (Id.)

See Reclamation District.

TAXATION.

1. **NATIONAL BANKS—LIMITATION OF POWER OF STATE.**—The right of the state to exercise its power of taxation over the property of national banks is limited and defined by section 5219 of the Revised Statutes of the United States; and the state can exercise no power of taxation not therein expressly permitted. (*First Nat. Bank v. City and County of San Francisco*, 96.)
2. **VOID ASSESSMENT OF PERSONAL ASSETS—RECOVERY OF TAXES PAID UNDER PROTEST.**—An assessment of the personal assets of a national bank by the state is not permitted and is void; and taxes collected under such void assessment, and paid under protest, may be recovered back. (*Id.*)
3. **ACTION TO RECOVER TAXES PAID UNDER PROTEST—FAILURE TO DEDUCT MORTGAGE FROM ASSESSMENT OF LAND—INSUFFICIENT COMPLAINT—NEGLECT OF PLAINTIFF.**—A complaint in an action against a county to recover taxes paid under protest, by reason of nondeduction of a mortgage to the regents of the state university from the total value of the property, which does not state the value of the property, nor show that a statement of plaintiff's property was demanded by or given to the assessor, and which shows that the plaintiff neglected to make any demand upon the assessor for a deduction from the assessment until after the work of the assessor had been performed, and he had lost jurisdiction to correct it, and also that he neglected to apply to the supervisors for a reduction of the assessment until after they had lost jurisdiction of the matter, states no cause of action. (*Henne v. County of Los Angeles*, 297.)

See Reclamation District; Sale, 14; Schools.

TENANTS IN COMMON. See Injunction, 6.

TENDER. See License, 1.

TRESPASS. See Eminent Domain.

TRUST. See Church.

VENDOR AND VENDEE.

1. **ASSIGNMENT OF CONTRACT OF SALE—REPRESENTATION AS TO TITLE—KNOWLEDGE OF FACTS—REFORMATION—RESCISSION.**—An assignment of a contract for the sale of land by a railroad company which had a patent therefor, made in consideration of the transfer of nursery stock by the assignee to the assignor, cannot be reformed or rescinded by the assignee on the ground that the assignor represented that the title was good, and that the contract did not express the understanding of the parties, if it appears that the contract to take the assignment of the contract of sale was clear and unambiguous, and fully understood by the assignee, and that both parties knew all the facts upon which the representation was based,

VENDOR AND VENDEE (Continued).

and believed that the railroad company had a good title to the land. (Choate v. Hyde, 580.)

2. **EXPRESSION OF OPINION BY VENDOR—EQUAL MEANS OF INFORMATION—ABSENCE OF FRAUD.**—A mere expression of opinion by the vendor as to the sufficiency of the title, if the means of information respecting it are equally accessible to both parties, or the same facts are within the knowledge of both parties, and no confidential relation exists between them, does not constitute fraud or deceit on the part of the vendor, and does not justify the purchaser in relying thereon. (Id.)

See Assignment; Sale.

VENUE. See Place of Trial.

WASTE. See Injunction, 1-3.

WATER AND WATER RIGHTS.

1. **ACTION TO DETERMINE WATER RIGHTS—JUDGMENT CONFERRING RIGHT TO LAY PIPE—APPEAL—STAY OF PROCEEDINGS—SUPERSEDEAS.**—Upon appeal from a judgment in an action to determine water rights, which confers upon the plaintiffs the right to lay a pipe through the land of the defendant, the statutory appeal bond in the sum of three hundred dollars stays proceedings in the court below upon the judgment appealed from; and a *supersedeas* will issue to restrain any proceedings under the judgment to lay the pipe line during the appeal. (Daly v. Ruddell, 300.)
2. **WATER RIGHTS—EXECUTED ORAL AGREEMENT—EASEMENT FOR PIPE—USER OF WATER—FINDING AGAINST EVIDENCE.**—In an action involving a water right, when the evidence showed that plaintiff's predecessor had, by an executed oral agreement with defendant's predecessor, and for a valuable consideration acquired an equitable title to the flow of water upon his land through a pipe connected with a tank on defendant's land, which was supplied with running water from a spring, and had by five years' user of the right agreed upon acquired the legal title to the easement for his pipe, and to the use of the water flowing from an orifice near the surface of the tank, to the extent agreed upon, a finding that defendants are entitled to the whole of the stream of water flowing from the spring is against the evidence. (Fogarty v. Fogarty, 46.)
3. **PRESUMPTION OF USER UNDER AGREEMENT.**—In the absence of evidence to the contrary, it must be conclusively presumed that the subsequent user of the right agreed upon was under the agreement, and therefore adverse as of right. (Id.)
4. **PRESCRIPTIVE TITLE—PLEADING—FINDINGS—CONJUNCTIVE DENIALS.**—Where the complaint alleged ownership in the plaintiff of the whole of the water flowing from the spring and also pleaded a

WATER AND WATER RIGHTS (Continued).

prescriptive title thereto under allegations that for more than five years, "plaintiff and his grantors have had the continuous, exclusive, uninterrupted, peaceable, notorious, and adverse use, enjoyment, and possession of the said water against defendant and all others, with the knowledge of all," etc., conjunctive denials of such allegations in the answer and in the findings are improper; and notwithstanding the form of the denials of the answer may have been waived at the trial, the form of the findings is not sufficient to negative the claim of adverse user. (Id.)

5. **SUFFICIENCY OF ADVERSE USER—CLAIM OF RIGHT—KNOWLEDGE OF ADVERSE PARTY.**—All that is necessary to make a user of water adverse is a claim of right in the party using it, and knowledge of the adverse party. The user of the water might be adverse, without being open or notorious. (Id.)
6. **DECAY OF TANK—USER FROM SPRING—CONSENT OF CLAIMANT—SUCCESSION OF TITLE—RIGHT OF RECOVERY.**—Where the tank with which plaintiff's pipe was connected became decayed, and a subsequent claimant of defendant's land, being defendant's immediate grantor, declined to allow the rebuilding of the tank at joint expense, and declared that he had then no use for the water, and plaintiff's grantor, by consent of such claimant, connected his pipe directly with the pipe from the spring so as to take all of the water therefrom, which was so used continuously by plaintiff and his grantor for eight years, plaintiff's right of use of the whole of the water flowing in the pipe from the spring is good as against all of the world, except the successors in interest of the owner who agreed with the plaintiff's grantor as to the limited right of user from the tank; and, if the defendant does not establish succession of his title from such owner, plaintiff is entitled to recover as against him. (Id.)
7. **IRRIGATION OF LANDS—LIEN OF WATER COMPANY FOR ANNUAL RATES—CONSTRUCTION OF CONTRACT—COVENANTS BINDING REPRESENTATIVES.**—In the absence of any law regulating water rates, a water company engaged in the irrigation of lands in a farming district may enforce a lien upon the lands to which water is supplied, as against a subsequent purchaser thereof, for nonpayment of the annual rates fixed by the contract with the original owner, when the contract makes the water supplied thereunder an appurtenance to the land upon which it is to be used, and contains a covenant binding the owner of the land, his heirs and assigns and successor in interest, to pay a fixed sum per year to the water company, although technically such covenant does not run with the land. (Fresno Canal etc. Co. v. Park, 437.)
8. **PUBLIC USE—REGULATION OF WATER RATE—FRANCHISE—CONSTITUTIONAL LAW—CONSTRUCTION OF CONSTITUTION.**—The provisions of the state constitution making the use of all water appropriated

WATER AND WATER RIGHTS (Continued).

for sale, rental, or distribution a public use, and subject to the regulation and control of the state in the manner to be prescribed by law, and declaring that the right to collect rates or compensation for the use of water in any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law, are not to be construed as taking away the right under the general law of the land to collect rates or compensation fixed by contract of the parties for the irrigation of lands, in the absence of a special statute, or authorized provision, regulating such rates. (Id.)

9. **CONSTRUCTION OF ACT OF 1885—POWER OF SUPERVISORS—MAXIMUM RATES—RIGHT OF CONTRACT.**—The act of March 12, 1885 (Stats. 1885, p. 95), does not destroy the right of contract between irrigation companies and the owners of land. It merely allows the supervisors upon proper petition to fix maximum rates, and the power of contract within such maximum rates is still preserved, and until the supervisors shall have acted, persons selling water are allowed to continue to collect their established and customary rates, without being required to make a formal declaration or to secure an ordinance to that effect. (Id.)
10. **WATER RIGHTS—ADVERSE USER—INTERRUPTION.**—An adverse user of the waters of a stream, in order to ripen into a title, must have been continuous and uninterrupted; and any interruption of the adverse user, however slight, prevents the acquisition of a prescriptive title. (*Bree v. Wheeler*, 145.)
11. **INSUFFICIENT FINDING—ADVERSE USER OF HALF OF STREAM.**—A finding of an adverse user of one-half of the stream in controversy, which shows that the user had been interrupted by the plaintiff at least once each year, by acts found to be acts of trespass, and which does not show that the defendant's user was open or notorious, is insufficient to support a judgment awarding one-half of the water to the defendant. (Id.)
12. **AGREEMENT FOR DIVISION OF STREAM NOT PLEADED—NEW TRIAL—AMENDMENT OF ANSWER.**—Where the defendant testified to an agreement between plaintiff and defendant for division of the stream, which was not pleaded nor found, he will be allowed leave to amend the answer upon a new trial granted upon appeal. (Id.)
13. **COMPLAINT—DEFECTIVE ALLEGATIONS—APPROPRIATION—ADVERSE USER—AMENDMENT.**—A complaint not specifically alleging that the plaintiff is the owner of the stream in controversy, and which attempts to allege an appropriation by plaintiff's grantor, without pleading the acts of such appropriation, and which alleges an adverse user by the plaintiff interrupted by the defendant, will be allowed to be amended upon a new trial granted upon plaintiff's appeal. (Id.)

WATER AND WATER RIGHTS (Continued).

14. **CONTRACT FOR WATER FOR IRRIGATION—PRICE PER ACRE—CONSTRUCTION OF CONTRACT.**—A contract to supply water for irrigation at the rate of two dollars per acre for the use of so much water as may be necessary for the reclamation and permanent irrigation for the annual production of crops upon a tract of one hundred and sixty acres, which provides that if there is not a sufficient supply of water and the crops fail no sum shall be paid, is to be construed as providing only for a price of two dollars per acre for so much of the land as is irrigated, and not for the entire tract without regard to the extent of irrigation. (*Purser v. Baker*, 607.)
15. **COMPLAINT FOR WATER FURNISHED AND DELIVERED ON PART OF TRACT—FINDINGS—APPEAL—PRESUMPTIONS.**—Under a complaint alleging that water was furnished and delivered on a certain part of the acreage of the tract at two dollars per acre, findings upon issues joined setting forth a less number of acres upon which water was furnished and delivered are conclusively presumed to be true upon appeal by the plaintiff from the judgment on the judgment-roll. Upon such appeal all presumptions are in favor of the judgment, and it cannot be presumed that plaintiff was injured by the failure of the defendants to irrigate more land than is specified in the findings, or to use water upon the entire tract. (*Id.*)

See Contract, 1-9; Injunction, 57; Place of Trial; Public Lands.

WILLS. See Estates of Deceased Persons, 19.

WRIT OF ASSISTANCE.

1. **PRACTICE—NOTICE OF HEARING—ORDER SHORTENING TIME.**—Under section 1005 of the Code of Civil Procedure, the lower court has power to shorten the time of notice for hearing an application for a writ of assistance to three days; and where there is nothing in the record on appeal to contradict a recital in the order shortening the time that it was made for good cause, it will be presumed that the necessity for the order was made to appear, and that the power was rightly exercised. (*California Mortgage etc. Bank v. Graves*, 649.)
2. **MORTGAGE—FORECLOSURE SALE—STAY OF EXECUTION—JUDGMENT-ROLL AS EVIDENCE.**—Notwithstanding the pendency of an appeal from a judgment foreclosing a mortgage of real property, the judgment-roll is admissible in evidence on an application for a writ of assistance to recover possession of the land sold at the foreclosure sale, if no undertaking staying the execution of the judgment has been given as provided in section 945 of the Code of Civil Procedure. (*Id.*)
3. **EVIDENCE IN SUPPORT OF WRIT—AFFIDAVIT.**—On an application for the writ of assistance as against the parties to the action, the

WRIT OF ASSISTANCE (Continued).

facts of the presentation of the sheriff's deed to them, the demand of possession of the land, and their refusal to surrender it, may be shown by affidavit. (Id.)

4. APPEAL FROM ORDER FOR WRIT—PRESENTATION OF DEED—DEMAND.

On an appeal from an order granting a writ of assistance against two defendants, as to only one of whom the record affirmatively showed that the sheriff's deed was prosecuted and a demand of possession made, it will be presumed, in the absence of evidence to the contrary, that the evidence before the court on the hearing showed that the other defendant had no such interest as necessitated the presentation of the deed or the making the demand. (Id.)



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129 Cal. 1-8. **MARK v. SUPERIOR COURT.**

Appeal from Final Judgment in action granting injunction which is mandatory in main purpose, suspends and stays operation of entire injunction, pp. 6, 7.

Approved in *State v. Superior Court*, 28 Wash. 408, on appeal from order awarding temporary mandatory injunction, commanding corporate officer to deliver property belonging to his office to another, the order may be superseded in that respect.

129 Cal. 12-14. **ROBINSON v. THORNTON.**

Miscellaneous.—*Green v. Thornton*, 130 Cal. 484, reciting history of litigation.

129 Cal. 14-16. **ESTATE OF HICKEY.**

Superior Court may, on application of minor heirs, made within time limited by Code of Civil Procedure, section 473, vacate order for settling final account, and of distribution on account of mistake or excusable neglect, pp. 15, 16.

Approved in *Levy v. Superior Court*, 139 Cal. 592, superior court has jurisdiction within six months to vacate order setting apart homestead, on motion of executors and heir, on ground of inadvertence, surprise and excusable neglect.

129 Cal. 33-36. **PEOPLE v. ROACH.**

In Prosecution for Assault to rape female under age of consent, neither element of force or question of consent are material, pp. 34, 35.

Approved in *People v. Totman*, 135 Cal. 135, following rule; *People v. Vann*, 129 Cal. 119, on trial for assault with intent to rape on girl under age of consent, fact that girl went voluntarily to room of defendant by previous appointment, and made no resistance, is immaterial.

129 Cal. 36-38. McBRIDE v. NEWLIN.

Taxpayer cannot enjoin board of supervisors from allowing alleged claim against county for printing, p. 37.

Approved in *Barto v. Supervisors*, 135 Cal. 496, following rule. Distinguished in *Johnston v. Sacramento Co.*, 137 Cal. 210, injunction lies to prevent supervisors of one county from performing unauthorized contract with supervisors of another county for joint construction, equipment, and maintenance of free public ferry across boundary river.

Board of Supervisors in passing on claim against county acts in quasi judicial capacity, and it is presumed board will do its duty and reject claim if illegal, p. 37.

Approved in *Glide v. Superior Court*, 147 Cal. 24, prohibition lies to prevent superior court from proceeding with trial of action to enjoin supervisors from acting on application for organization of reclamation district; *Alameda Co. v. Evers*, 136 Cal. 134, allowance by supervisors for services of coroner which were proved before it, and which were paid by treasurer upon auditor's warrant, cannot be recovered in collateral action by county which does not directly attack judgment of board, but alleges services were not in fact rendered; *Santa Cruz Co. v. McPherson*, 133 Cal. 284, where supervisors have acted on bids for printing all defenses that might have been made to claim before them are precluded and cannot be urged in action to recover back money paid on their allowance.

129 Cal. 46-51. FOGARTY v. FOGARTY.

In Absence of Contrary Evidence, it is conclusively presumed that subsequent user of water right agreed upon was under agreement and therefore adverse as of right, p. 49.

Distinguished in *Rose v. Mesmer*, 142 Cal. 331, where there was general understanding and consent by all owners of waters of creek that any part of water could be diverted and used when not required by others, and where there was surplus, it could be used upon other than first-class lands, user of surplus on pasture lands is not adverse to owners of first-class lands.

On Appeal from Order denying new trial, objection to sufficiency of findings is no ground for reversal, p. 50.

Approved in *Kepfler v. Kepfler*, 134 Cal. 206, delay of more than six months in filing findings in divorce after judgment ordered, is not ground for new trial, and cannot be considered on appeal from order denying new trial.

Miscellaneous.—*Montecito Valley Co. v. Santa Barbara*, 144 Cal. 599, finding in effect and substance that defendants are entitled to all water flowing in tunnel in excess of 1.43 inches, to which plaintiff is entitled,

fixes plaintiff's right as against them, and omission of an additional finding as to how much water tunnel was carrying cannot injure plaintiff.

129 Cal. 51-57. **FONTANA v. PACIFIC CAN CO.**

Motion for Nonsuit on grounds not ordinarily specific to bring it within ordinary rule applicable thereto is not within rule where defects of plaintiff's case are incurable, if they had been specifically pointed out, p. 55.

Approved in *Warner v. Warner*, 144 Cal. 619, following rule.

129 Cal. 68-86. **WESTERFIELD v. NEW YORK L. INS. CO.**

Where There is an Unrescinded Existing Compromise it is binding when suit is commenced and is a bar thereto which is not removed by judgment or verdict, p. 85.

Distinguished in *Montgomery v. McLaury*, 143 Cal. 88, an election to disaffirm a contract induced by fraud, and an effort to obtain rescission of it will not, if resisted, bar action and judgment based upon subsequent affirmation of contract, and commencement of such action is in itself an affirmation.

129 Cal. 86-90. **ESTATE OF PORTER.** 79 Am. St. Rep. 78.

Code of Civil Procedure, Section 1536, providing administrator may sell property of estate when it appears to satisfaction of court that it is for the advantage, benefit and best interest of the estate, is valid, pp. 87-89.

Approved in *Gutter v. Dallamore*, 144 Cal. 668, sale of land for advantage, benefit and best interest of estate, though invalid as to titles vested prior to amendment of 1893 to Code of Civil procedure, section 1536, is valid as to titles vested subsequent to that amendment; *Estate of Leonis*, 138 Cal. 201, order vacating order of sale, upon motion of heirs for want of actual notice to them, and on ground that it was not necessary for payment of debts, as adjudged by court, order remaining supported by unassailed finding that sale was for best interest of estate, is void. See 78 Am. St. Rep. 863, note.

Miscellaneous.—*Estate of Piper*, 147 Cal. 608, heirs of deceased husband where on distribution it is decreed that property was separate property of wife whose estate was being distributed cannot appeal from distribution to state for use of school.

129 Cal. 118-123. **PEOPLE v. VANN.**

In Prosecution for Assault with intent to rape female under age of consent, her failure to resist is no defense, p. 119.

Approved in *People v. Derbert*, 138 Cal. 468, and *People v. Harlan*,

133 Cal. 22, both following rule; *People v. Curiale*, 137 Cal. 538, woman cannot be witness against husband in prosecution for rape committed by him on woman prior to marriage while she was under age of consent, where she freely consented to marriage.

In prosecution for raping girl under age of consent, evidence of administration of liquor to female is admissible, p. 121.

Approved in *People v. Jailles*, 146 Cal. 304 upholding information for rape which in one count avers force and resistance without stating age, and second simply alleges sexual intercourse with female, being under age of sixteen.

129 Cal. 123-131. **STARR v. KREUZBERGER.** 79 Am. St. Rep. 92.

Servant is not Required to use any degree of care or negligence to discover defects or danger not obvious, p. 129.

Approved in *Dolan v. Sierra Ry. Co.*, 135 Cal. 439, where employee was in fact ignorant of defective construction of trestle, he did not assume risk thereof by traveling over it.

129 Cal. 141-145. **HUDSON v. HUDSON.**

In Divorce where complaint states sufficient acts of cruelty to constitute offense of extreme cruelty, demurrer is properly overruled, p. 142.

Approved in *Machado v. Kinney*, 135 Cal. 355, following rule.

Mandamus is Proper for wrongful refusal to settle bill of exceptions, p. 145.

Approved in *Murphy v. Stelling*, 138 Cal. 643, mandamus is not proper where motion is for relief on ground of excusable neglect in failing to deliver proposed statement on motion for new trial and amendments to clerk for judge in proper time.

129 Cal. 148-156. **TOLAND v. EARL.** 79 Am. St. Rep. 100.

Law of an Estate distributed under a will is decree of distribution and not the will and decree is conclusive upon whole world, p. 152.

Approved in *Estate of Willey*, 140 Cal. 241, advance payments made by executors to beneficiaries named in will without order of court cannot be considered in settlement of accounts, when not accompanied by petition for distribution.

Superior Court which has jurisdiction of administration of estate of deceased person has exclusive jurisdiction as probate court over all questions relating to settlement and distribution of estate, p. 155.

Approved in *Kauffman v. Gries*, 141 Cal. 301, where decree of distribution distributed land to husband without imposing any charge thereon, and also distributed one thousand dollars to lodge under conditions contemplated by will, rights of lodge are limited by such decree; Es-

tate of Davis, 136 Cal. 598, petition to revoke probate of will to which defendants were brought in by citation, cannot be construed into bill in equity to declare trust under decree of distribution; Estate of Freud, 134 Cal. 336, court in action to foreclose right of redemption had no jurisdiction to determine matter involved in distribution of estate of decedent; Estate of Freud, 131 Cal. 673, order allowing sale by administrator for purpose of obtaining means for redemption of mortgage made by decedent confers on him authority to redeem, which cannot be questioned.

Probate Court has no jurisdiction to determine controversies not strictly within the probate proceedings, p. 155.

Approved in Estate of Ryder, 141 Cal. 368, superior court sitting as probate court has no jurisdiction to determine right of grantee of heir apparent under deed made prior to decedent's death or to distribute estate to such grantee against objection of grantor, who is sole heir of decedent.

129 Cal. 157-160. **JARMAN v. REA.**

An Appeal Cannot be Dismissed when entire record in transcript must be examined to ascertain sufficiency of grounds urged in motion, p. 160.

Approved in Estate of Kasson, 135 Cal. 3, an appeal from order denying new trial will not be dismissed on ground that judgment was given against appellant by default.

129 Cal. 160-164. **SAN LUIS OBISPO CO. BANK v. GOLDTREL.**

Where Note Secured by Deed contains provision for attorneys' fees in case of suit, allegation that conveyance was intended to secure payment of said note includes contract to pay attorneys' fees, p. 163.

Approved in Commercial Sav. Bank v. Hornberger, 140 Cal. 21, where insurance policy was pledge to secure notes providing for attorneys' fees in action thereon, pledgee in subsequent action to foreclose pledge is entitled to attorneys' fees allowed in former action upon notes, as against wife of pledgor who was husband's assignee of policy, though not made party to former action; Peachy v. Witter, 131 Cal. 319, where note set out in complaint and appearing to have been secured by mortgage, contained provision for attorney's fee as part of note, it was proper to embody allowance for attorney's fee in foreclosure decree.

129 Cal. 177-180. **STEWART v. HOLLINGSWORTH.**

Omission to Make Findings upon issues presented by cross-complaint is not ground for reversal where there is no bill of exceptions, p. 180.

Approved in Callahan v. James, 141 Cal. 294, in action by owner of mining claim to quiet title against defendants claiming under townsite entry, where evidence in statement is sufficient to justify finding that

annual work was done by plaintiff, and there is no evidence to sustain defense of forfeiture, failure to find on such defense is not ground for reversal, *Roberts v. Hall*, 147 Cal. 439, omission to find upon defense set up in answer in injunction is not fatal when record purporting to contain all evidence shows that no evidence was introduced thereupon.

129 Cal. 192-193. DAYTON v. McALLISTER.

In Foreclosure when record shows that judgment creditor of mortgagor made defendant was subsequent to conveyance made by mortgagor, and had no lien, he is not party aggrieved on appeal, p. 193.

Approved in *Foster v. Bowles*, 138 Cal. 452, where claimant of judgment lien who took issue upon claimant in mortgage foreclosure, and set up his alleged lien and sought foreclosure thereof, failed to appear at trial, decree based on finding that allegations of answer are untrue will not be reversed on appeal.

129 Cal. 194-196. WHITEHURST v. STUART.

Defective Statement of Material Fact is waived by failure to demur specially, p. 196.

Approved in *Duke v. Huntington*, 130 Cal. 274, averment in complaint against stockholder for proportionate shares of corporate debts that corporation became indebted in certain sum on specified day, being balance due for certain work, is good in absence of special demurrer for uncertainty.

129 Cal. 197-203. COONAN v. LOEWENTHAL.

Complaint may be Amended at trial by changing figure therein, it being agreed that answer should stand as answer to complaint as amended, p. 200.

Approved in *Chamberlain v. Loewenthal*, 138 Cal. 50, 51, court may permit amendment of complaint by changing dates between which services were alleged to have been rendered, by writing changed dates on face of original complaint, where defendant answered it as an amended complaint.

129 Cal. 208-221. CURTIS v. SCHELL, 79 Am. St. Rep. 107.

In Equity Proceedings by mortgagee of widow's interest in estate to set aside family allowance for past maintenance made upon fraudulent application, court may direct proceeds of sale of realty to pay such allowance be first applied toward payment of mortgage, pp. 211-215.

Approved in *Gutter v. Dallamore*, 141 Cal. 669, where heir assigned to his mortgagee, as security for debt, all his interest in estate, assignee may enforce lien upon interest of heir for amount found due, with costs, to be paid out of moneys in hands of administrator belonging to heir;

Savings Bank v. Schell, 142 Cal. 508, 509, 510, where executrix was widow to whom will gave all income to support family until youngest child became of age, fraudulently concealed fact that income was sufficient for support, obtained family allowance reaching back many years, and obtained sale of realty to pay allowance, mortgagee of heir who borrowed money to support family may maintain action in equity to enforce payment out of proceeds of sale.

Suppression of Material Facts in matter extrinsic and collateral to question examined on application for family allowance is fraud against which equity will relieve, pp. 215, 216.

Approved in **People v. Perris Irr. Co.**, 142 Cal. 606, upholding sufficiency of complaint to set aside decrees of confirmation of organization of irrigation district on ground that they were procured by fraud extrinsic to merits; **Silva v. Santos**, 138 Cal. 541, where decree settling final account of guardian was procured by fraudulent concealment of moneys misappropriated by guardian and fraudulent misrepresentation to court that he had made advances to estate, equity will compel full and just accounting; dissenting opinion in **Mulcahey v. Dow**, 131 Cal. 80, majority holding Code of Civil Procedure, section 2224, relative to involuntary trustees applies only where fraud is shown to be extrinsic and collateral to merits of proceedings for distribution, and is so clearly shown as to justify equity in setting aside decree for fraud in its procurement.

Probate Court cannot determine rights of strangers to estate, p. 220.

Distinguished in **Estate of Vance**, 141 Cal. 627, *arguendo*.

129 Cal. 222-229. **SAMPLE v. FLUME ETC. CO.**

Impossibility Which Will Excuse Nonperformance must consist in nature of thing to be done, and not in inability of party to do it, p. 228.

Approved in **Wilson v. Alcatraz Asphalt Co.**, 142 Cal. 189, if performance of contract is possible and lawful, and there is no impossibility in nature of thing to be done, obligor must make compensation in damages though performance impossible by unforeseen cause for which no provision is made.

129 Cal. 229-231. **WILLIAMS v. LONG.**

Injunction in Ejectment cannot restrain defendant from entering upon land sued for, provided no waste is committed, p. 231.

Approved in **San Antonio W. Co. v. Bodenhamer**, 133 Cal. 251, *ex parte* injunction to prevent defendant from interfering with alleged right of plaintiff to pump water from well upon specified lot cannot be granted where complaint alleges nothing about possession of lot.

129 Cal. 232-239. **BERONIO v. VENTURA CO. L. CO.** 79 Am. St. Rep. 118.

Homestead cannot be made on premises used for store and hotel, though family reside in hotel, p. 236.

Distinguished in *Estate of Levy*, 141 Cal. 650, entire building composed of three flats with separate entrances, top one of which was occupied as residence by testator and wife, may be set apart to widow as probate homestead.

Judgment is not Estoppel unless identical questions involved in issues to be tried were determined in former action, p. 236.

Approved in *Cady v. Purser*, 131 Cal. 561, 82 Am. St. Rep. 398, where purchaser at sheriff's sale was defendant in foreclosure suit under averment that his interest was subordinate to mortgagee's, and he took issue thereon and pleaded title paramount thereto, purchaser not estopped by decree from asserting his paramount right in action to quiet title against foreclosure purchaser.

Miscellaneous.—*Rodgers v. Parker*, 136 Cal. 316, cross-complaint cannot dismiss cross-complaint after filing of answer thereto seeking affirmative relief; *Van Loben Sels v. Bunnell*, 131 Cal. 494, when prior lien-holder is made party to action to foreclose mortgage he may seek foreclosure of his lien by cross-complaint.

129 Cal. 239-243. **FARMERS' EXCHANGE BANK v. MORSE.**

Where Parties Having Undivided Interests in lands covered by several foreclosure judgments agreed to execute joint note for aggregate amount of judgments, such agreement overcomes presumption of joint and several promise, p. 242.

Distinguished in *Gummer v. Mairs*, 140 Cal. 537, 538, in action against one only of two purchasers under contract for sale of land, in which two purchasers have equal interest as tenants in common, their promise to pay purchase money is presumed to be joint and several.

129 Cal. 251-258. **METHVIN v. FIDELITY ETC. INS. CO.**

Insurance Policy expressly providing that in case of nonpayment of premium at time fixed policy shall be void, and all payments thereunder forfeited, ceases to be effective in such case at option of insurer, p. 256.

Approved in *Caylord v. Ins. Co.*, 144 Cal. 766, following rule.

Fact that Policy which provided for advance payment on premium for first quarter from its date was not delivered until one month after date does not extend operation of first premium for three months from delivery, p. 257.

Approved in *Thomas v. Northwestern etc. Ins. Co.*, 142 Cal. 85, it was

erroneous to instruct jury that policy did not go into effect until date of delivery, where by its terms premiums were payable with reference to date of its issuance.

129 Cal. 258-263. PEOPLE v. PUTNAM.

Instructions may Assume Facts admitted or proved without shadow of conflict of evidence, p. 263.

Approved in *People v. Allen*, 144 Cal. 301, in absence of evidence it is presumed on appeal in prosecution for rape that instruction assuming that prosecutrix's drawers were thrown through window at time of commission of offense was based on facts undisputed or admitted.

Witness who has been convicted of felony may be asked nature of felony, p. 262.

Approved in *People v. Eldridge*, 147 Cal. 786, following rule.

129 Cal. 279-283. CAMERON v. ARCATA ETC. R. CO.

Judge Cannot Grant Extension of Time to present bill of exceptions, exceeding in aggregate thirty days, without consent of opposite party, p. 282.

Approved in *Freese v. Freese*, 134 Cal. 49, extension by judge of time to prepare statement on motion for new trial, though within limit of thirty days, is void, if time previously allowed moving party had elapsed while mover was in default.

129 Cal. 283-293. NEWMAN v. FREITAS.

Law Does not Favor Divorce, p. 289.

Approved in *Deyoe v. Superior Court*, 140 Cal. 483, upholding interlocutory divorce decree law of 1903, adding sections 131 and 132 to Civil Code.

129 Cal. 297-300. HENNE v. LOS ANGELES CO.

Where Complaint in Action to Recover Taxes paid under protest shows that plaintiff neglected to apply to supervisors for reduction of assessment until after they had lost jurisdiction of the matter states no cause of action, p. 299.

Approved in *Columbia Sav. Bank v. Los Angeles*, 137 Cal. 469, action of board of equalization in refusing to grant petition of taxpayer to strike out assessment made by assessor of moneys invested in government bonds is not conclusive on taxpayer, in action by him to recover taxes paid thereon under protest.

Failure of assessor to deduct amounts due on mortgage does not render assessment void, p. 299.

Approved in *Palomares Land Co. v. Los Angeles Co.*, 146 Cal. 535, following rule.

129 Cal. 306-308. PEOPLE v. ARNETT.

Verdict Finding Defendant Guilty of offense with which he is not charged is a nullity, p. 307.

Approved in *People v. Smith*, 136 Cal. 208, where information charged burglary in first degree as having been committed in night-time, verdict of guilty of burglary in second degree is void; *People v. Tilley*, 135 Cal. 62, verdict finding defendant guilty of "receiving stolen property" is insufficient.

129 Cal. 308-315. MELDE v. REYNOLDS.

Where Failure of Defendant to be represented at trial was owing to excusable neglect of his attorney, abuse of discretion of court in refusing to set aside judgment for plaintiff will be reversed on appeal, p. 311.

Approved in *Winchester v. Black*, 134 Cal. 127, and *Moore v. Thompson*, 138 Cal. 27, both following rule.

Code of Civil Procedure, section 473, is remedial and is to be liberally construed, p. 311.

Approved in *Nicholl v. Weldon*, 130 Cal. 668, following rule.

129 Cal. 318-322. MURRAY v. ETCHEPARE.

Principle that Adverse Titles cannot be litigated in foreclosure and are not affected by decree therein applies also to adverse equitable titles, p. 321.

Approved in *Peachy v. Witter*, 131 Cal. 320, motion to intervene in action for foreclosure by one who claims title must show title which can be litigated in action of foreclosure. See 79 Am. St. Rep. 122, note, note.

129 Cal. 322-324. KRUG v. LUX ETC. BREW. CO.

When Answer Contains Both Denials and affirmative allegations of matter of defense, findings that all allegations of complaint are true and that all of allegations of answer, so far as inconsistent with complaint, are not true, cannot support judgment for plaintiff, pp. 323, 324.

Distinguished in *Continental B. etc. Assn. v. Wilson*, 144 Cal. 781, general findings in ejectment that all allegations of complaint are true, except as to amount of damages, and that all allegations of answer and cross-complaint are untrue, and that allegations of answer to cross-complaint are true are not objectionable because of admissions in answer to cross-complaint of uncontroverted facts stated therein.

129 Cal. 330-337. IN RE BUCHANAN.

Question Whether Defendant has become sufficiently sane to be tried is not to be judged according merely to medical view of sanity or in-

sanity, but is to be determined with reference to statute, pp. 332-333.

Approved in dissenting opinion in *People v. Zeigler*, 142 Cal. 340, majority holding where evidence of insanity at time of commission of offense was not directed to state of mind at time of trial, instruction on question of sanity at trial is not ground for reversal.

129 Cal. 337-349. BRITTON v. BOARD OF ELECTION COMMISSIONERS.

Statutes of 1899, page 47, known as primary election law violates article 1 of the constitution of California and is void, pp. 340-347.

Approved in *Murphy v. Curry*, 137 Cal. 486, 488, 489, Political Code, section 1197, forbidding name of nominee to be placed on ballot more than once, and requiring nominee of more than one political party to make his election, is void; *Ladd v. Holmes*, 40 Or. 180, 187, 188, upholding election law of 1901, p. 317. Distinguished in *Ex parte Gerino*, 143 Cal. 416, upholding act of February 20, 1901, regulating practice of medicine and surgery.

Miscellaneous.—*Bradley v. Voorsanger*, 143 Cal. 215, *arguendo*.

129 Cal. 356-360. MALLORY v. SEE.

Notice of Decision required by Code of Civil Procedure, section 659, is required by Code of Civil Procedure, section 1010, to be in writing, pp. 357, 358.

Approved in *Gardner v. Stare*, 135 Cal. 119, notice of motion for new trial by defendant, served and filed more than ten days after written notice of decision appears to have been waived, by facts appearing in records, is too late.

129 Cal. 367-376. RICHTER v. UNION LAND ETC. CO.

In *Executory Contracts* several obligations of parties constitute to each reciprocally the consideration of the contract, and a failure to perform the contract constitutes a failure of consideration, p. 372.

Approved in *Smith v. Blandin*, 133 Cal. 444, following rule.

129 Cal. 389-390. McGEARY v. SATCHWELL.

Agreement authorizing or employing an agent to sell real estate for commission must be in writing, p. 390.

Approved in *Jamison v. Hyde*, 141 Cal. 113, where there is no written contract for employment of plaintiff to sell real estate plaintiff cannot recover reasonable value of services in selling it.

129 Cal. 390-397. UNION SHEET AND METAL WORKS v. DODGE.

Validity of Bond given by contractor for performance of contract to build schoolhouse, which recites valuable consideration and guarantees

payment of claims of laborers and materialmen, does not depend upon applicability of mechanics' lien law to public building, pp. 393-396.

Approved in *People's Lumber Co. v. Gillard*, 136 Cal. 58, contractor's bond given to school district to secure performance of building contract which is in form of common-law bond, and does not refer to statute providing therefor, though made in pursuance thereof, is valid, without reference to validity of statute.

129 Cal. 404-409. GLENN CO. v. JOHNSTON.

Where More Than Thirty Days elapsed after final judgment without deposit in court of sum assessed by verdict in proceeding brought by county to condemn right of way for road, defendant may have entire proceedings vacated and annulled, p. 407.

Approved in *Madera Co. v. Raymond G. Co.*, 139 Cal. 132, upon appeal in condemnation proceedings taken on judgment-roll alone, statement in final order that damage money was deposited prior to judgment does not show error prejudicial to appellant.

Code of Civil Procedure, sections 1251, 1252, apply to municipal corporations, p. 408.

Approved in *Madera Co. v. Raymond G. Co.*, 139 Cal. 133, where money payable by municipality for condemnation of land for private road has been paid into court, and was subject to defendant's call, error in judgment as being in personam against city, on which execution cannot issue, is without injury to defendant.

129 Cal. 409-415. LONG BEACH SCHOOL DISTRICT v. LUTGE.

Miscellaneous.—*Long Beach Dist. v. Dodge*, 135 Cal. 403, reciting history of litigation.

129 Cal. 419-425. HALE v. BARKER.

Under Mortgage by Member of Building and Loan Society where it is agreed that when stock is fully paid up it shall be applied to discharge mortgage, and shares are assigned as collateral security and interest and dues are consolidated in mortgage, it is implied that monthly payments are to be credited on mortgage, pp. 423-425.

Approved in *Western Sav. Co. v. Houston*, 38 Or. 381, where loan by building and loan association amounts to ordinary loan as distinguished from loan by the association to a member, borrower is entitled to have credited as payments on loan all sums he may have turned in, regardless of names by which they have been or may be called.

129 Cal. 427-430. PERKIS v. WEST COAST LUMBER CO.

Findings are to receive such construction as will uphold rather than defeat judgment thereon, p. 429.

Approved in *De Haven v. Berendes*, 135 Cal. 180, applying rule in action upon street assessment.

129 Cal. 437-451. FRESNO CANAL ETC. CO. v. PARK.

Constitutional Provisions making use of water appropriated for sale, a public use, and subject to control and regulation by state, and declaring right to collect rates for city, a franchise, are not construed to take away right under general law or contract to collect rates for irrigation of lands, pp. 443-445.

Approved in *San Diego Flume Co. v. Souther*, 104 Fed. 707, holding under California constitution, article 14, section 2, contract for supplying water and payment of rentals therefor until such time as legislature shall expressly confer power by statute to make such contracts, is not invalid; *Souther v. San Diego Flume Co.*, 112 Fed. 229, 230, and *San Diego Land etc. Co. v. Jasper*, 189 U. S. 445, both arguendo. Distinguished in *San Diego Land etc. Co. v. Jasper*, 110 Fed. 706, 708, reviewing prior decisions relative to water rates.

129 Cal. 461-466. WILLIAMS v. BERGIN.

In Action to Foreclose Lien of street assessment evidence of documents provided by statute as prima facie evidence of regularity of assessment and of prior proceedings throws burden of proof on defendant, p. 463.

Approved in *City St. Imp. Co. v. Laird*, 138 Cal. 30, corporate seal not essential to validity of contract for street improvement made by corporation; *San Francisco Pav. Co. v. Bates*, 134 Cal. 41, bid for street work signed in name of corporation by its secretary, which was accepted by board, in absence of evidence to contrary, is presumed to have been shown to board to have been authorized by corporation.

129 Cal. 468-471. IN RE ROGERS. S. C. RODGERS v. SUPERIOR COURT, 145 Cal. 89, 91, 92.

Relevancy and Pertinency of Questions to matter under investigation rests with judge and not with witness, but judge's decision is reviewable on appeal, p. 469.

Approved in *Overend v. Superior Court*, 131 Cal. 283, witness in criminal case is not exclusive judge as to whether or not answer to question would tend to convict him of felony, but it is a matter for trial court to decide subject to review on appeal.

It is for Court to Pass Upon Question which witness objects to answering and not for witness to decline to answer upon mere declaration that answer may tend to incriminate or degrade him, p. 470.

Approved in *Bradley v. Clark*, 133 Cal. 209, it is error for trial court to
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exclude answers on naked declaration of witness that questions asked to prove offenses by defendant would tend to criminate or degrade the witness.

129 Cal. 480-488. CONWAY v. HART.

Where stakes had been previously set by former locators which so distinctly marked location on ground that it could be readily traced, it was not necessary to reset them or plant other stakes, pp. 483, 484.

Approved in Dwinnell v. Dyer, 145 Cal. 19, applying rule where location boundaries marked in accordance with prior repealed statute and locator had possession.

129 Cal. 491-493. PEOPLE v. LEE DICK LUNG.

Evidence of Witness for People that Chinese society sending letters was highbinder secret society which could be hired for murder or blackmail, is inadmissible in absence of evidence that defendant was member, p. 493.

Distinguished in People v. Moran, 144 Cal. 62, in prosecution for murder committed in pursuance of conspiracy, statement of defendant that some one in saloon spoke of going out to "get a scab" was admissible in connection with proof that he acted upon the suggestion, and went with others to wait for car conveying the "scab" who was killed, and at signal boarded that car.

129 Cal. 497-514. PEOPLE v. VERENESENECKOCKOCKHOFF.

Instruction that it may be impossible to show or establish motive because we cannot fathom mind of accused and ascertain if there is hidden desire for vengeance or some passion to be gratified, is an argument against defendant on facts, and erroneous, p. 508.

Approved in People v. Enwright, 134 Cal. 529, holding erroneous an instruction as to motive in prosecution for murder where defendant relied wholly on self-defense; Mabb v. Stewart, 133 Cal. 565, holding it is error to give instructions strongly argumentative in favor of plaintiffs which were not justified by the evidence.

Instruction that circumstantial evidence is not entitled to less degree of credit than direct evidence and that circumstances are not likely to be fabricated, is instruction on matter of fact, and erroneous, p. 512.

Approved in People v. Botkin, 132 Cal. 232, following rule; Estate of Blake, 136 Cal. 311, in will contest where mental condition of testator was in issue, instruction discrediting testimony of experts given on hypothetical questions, as unsatisfactory and unreliable, and giving reasons why, in judge's opinion, it was such, is erroneous; People v. O'Brien, 130 Cal. 8, holding erroneous an instruction relating to com-

parative weight or relative value of circumstantial evidence and direct evidence of eye witnesses; *People v. Adams*, 143 Cal. 213, and *People v. Huntington*, 138 Cal. 265, both arguendo. Distinguished in *People v. Farrington*, 140 Cal. 659, upholding instruction as to effect of recent possession by defendant of stolen property as circumstance tending to prove his guilt of grand larceny; *People v. Amaya*, 134 Cal. 540, upholding instruction that presumption that witness speak truth may be repelled by his "interest in the case, or his bias or prejudice against one of the parties" as well as "by the manner in which he testifies" by the character of his evidence, or by impeaching or contradictory evidence; *People v. Wilder*, 134 Cal. 184, holding instruction on circumstantial evidence not prejudicially erroneous.

129 Cal. 514-525. **MELONE v. RUFFINO.**

Allegation of Nonpayment of Debt Sued on though necessary to make complaint perfect need not be proved, but burden of proof of payment is on defendant, p. 518.

Approved in *Roche v. Baldwin*, 143 Cal. 191, in action by assignee of an attorney against client for reasonable value of services, where defendant pleaded specific contract and payment thereunder, burden of proof was upon him to establish such defenses; *Stuart v. Lord*, 138 Cal. 674, in action against administrator for services rendered to deceased, burden of proof does not rest upon plaintiff to show nonpayment, but is upon defendant to prove payment; *Hurley v. Ryan*, 137 Cal. 462, applying rule in action upon rejected claim against estate of deceased person; *Dirks v. Cal. Safe Deposit etc. Co.*, 136 Cal. 87, in action by husband against wife's executor to recover money transferred to her, and deposited in her name under agreement that principal should not be withdrawn by her before his consent or death, and that at her death it should belong to him, executor has burden of proving husband's consent; *Pastene v. Pardini*, 135 Cal. 434, in action on note its production is sufficient evidence to sustain allegations of nonpayment; dissenting opinion in *Estate of Latour*, 140 Cal. 430, 431, majority holding burden on proof on contest of will to prove negative allegation or nonexecution of will, when he alleges it as ground of contest. Distinguished in *Estate of Latour*, 140 Cal. 421, burden of proof is on contestant of will to prove negative allegation of nonexecution of will, when he alleges it as ground of contest.

129 Cal. 564-566. **BAKER v. VARNEY.**

In Action to Foreclose Mortgage court cannot appoint receiver of rents and profits merely upon stipulation in mortgage without any showing of facts warranting appointment under Code of Civil Procedure, section 564, p. 565.

Approved in *Bank of Woodland v. Stephens*, 144 Cal. 662, following

rule. Distinguished in *Garretson Ins. Co. v. Arndt*, 144 Cal. 66, where there is nothing in complaint to justify appointment of receiver pending foreclosure, except stipulation in mortgage providing for appointment on ex parte application, it may be presumed in support of judgment that appointment was made upon motion and affidavits.

129 Cal. 567-575. IN RE WERNER.

Every Act shall embrace but one subject, which subject shall be embraced in its title, p. 570.

Approved in *Pratt v. Browne*, 135 Cal. 653, salary of official reporters is not included in or germane to title of act of statutes of 1897, page 546, to create "a uniform system of county government" and provisions therefor is void.

No Law Can be Amended by reference to its title, p. 570.

Approved in *Erickson v. Cass Co.*, 11 N. Dak. 503, upholding laws, of 1899, chapter 79, entitled "An act to amend section 1466 of the Revised Codes, relating to the establishment, construction and maintenance of drains."

Under Maxim of Constitution, "Expressio unius est exclusio alterius," legislature cannot clothe public corporation, not municipal, with local governmental powers, p. 574.

Approved in *Ex parte Anderson*, 184 Cal. 74, holding void section 13 of county government act of 1897 (Stats. 1897, p. 454), permitting electors of county to frame and pass ordinances for government of county.

129 Cal. 589-596. EPHRAIM v. PACIFIC BANK.

If Receiver Gains Possession of Fund through unauthorized appointment, he must look for compensation to party at whose instance he was appointed, p. 592.

Approved in *Chapman v. Atlantic Trust Co.*, 119 Fed. 270, where costs and expenses of management of mortgaged property by receiver exceed proceeds of property sold, and court has expressly retained jurisdiction over subject matter and parties until final settlement of accounts, it has power on such settlement to render judgment against complainant who had receiver appointed; *Tobin v. Portland Flouring Co.*, 42 Or. 122, when receiver has been appointed, and has taken charge of certain property, his fees and expenses are first lien on proceeds thereof, if he was regularly appointed, and court had jurisdiction over property.

If Plaintiffs in Foreclosure sued by receiver for compensation claim that defendants in original action were liable to receiver as well as themselves it is matter of defense to be pleaded by them, pp. 594, 595.

Approved in *Ephraim v. Pacific Bank*, 136 Cal. 648, 649, in action by receiver against bank, at instance of which he was appointed receiver, to recover unpaid allowance made by court after dismissal of suit in which he was appointed, evidence that he was appointed at own request, and that he would look solely to income, and that bank would not be liable for his services or expenses, is admissible for defendant.

129 Cal. 596-598. GRIFFITH v. LEWIN.

Substantial Compliance with Requirements of statute respecting verification of claims against estates of deceased persons is sufficient, p. 598.

Approved in *Guerian v. Joyce*, 133 Cal. 406, claim against estate, verification of which states that sum is justly due claimant, and that no payments have been made thereon which are not credited, and that there are no effects to same to knowledge of claimant, "except some small items, exact amount of which is not known to affiant, but which she is willing to have credited upon same when same is shown by administrator," is valid.

129 Cal. 599-607. BOARD OF EDUCATION v. BOARD OF TRUSTEES.

Words "corporate authorities thereof" in constitution, article 11, section 12, construed, p. 604.

Approved in *Merchants' Bank v. Escondido Irr. Dist.*, 144 Cal. 334, constitution, article 11, section 13, applies to irrigation districts.

Under Municipal Corporations' Act in cities of first five classes, educational department has no legislative power, but all other cases are governed by Political Code, pp. 605, 606.

Approved in *Brown v. Visalia*, 141 Cal. 380, construing power of city of fifth class to provide revenue for high school; *Hancock v. Board of Education*, 140 Cal. 562, action by principal of high school for remainder of salary for school year properly brought against board of education of city, and not against city.

129 Cal. 614-618. WRIGHT v. BRYNE.

Note of New Guardian given for money borrowed for support of ward by previous guardian, which is not approved by court, cannot bind ward, p. 617.

Distinguished in *McDonald v. Randall*, 139 Cal. 252, extension of time to husband evidenced by note executed by him was sufficient consideration for execution of mortgage on part of wife to secure payment of husband's debt evidenced by such note.

129 Cal. 673-681. SAN JOSE LAND ETC. CO. v. SAN JOSE RANCHO CO.

Miscellaneous.—San Dimas etc. Co. v. San Jose etc. Co., 142 Cal. 585; Mowry v. Weisenborn, 137 Cal. 114.

129 Cal. 690-693. **OBERLANDER v. FIXEN.**

Under Code of Civil Procedure, Section 657, new trial on ground of newly discovered evidence should not be refused merely because evidence is cumulative, p. 692.

Approved in *Wilson v. Seaman*, 15 S. Dak. 105, upholding denial of motion for new trial for newly discovered evidence, when affidavit did not state reason why defendant had not procured evidence at the trial, and there was no showing of diligence to discover evidence before trial.

Whether Newly Discovered Evidence, though cumulative, is sufficiently strong to render different result probable is for trial judge whose discretion will not be disturbed on appeal in absence of abuse, p. 692.

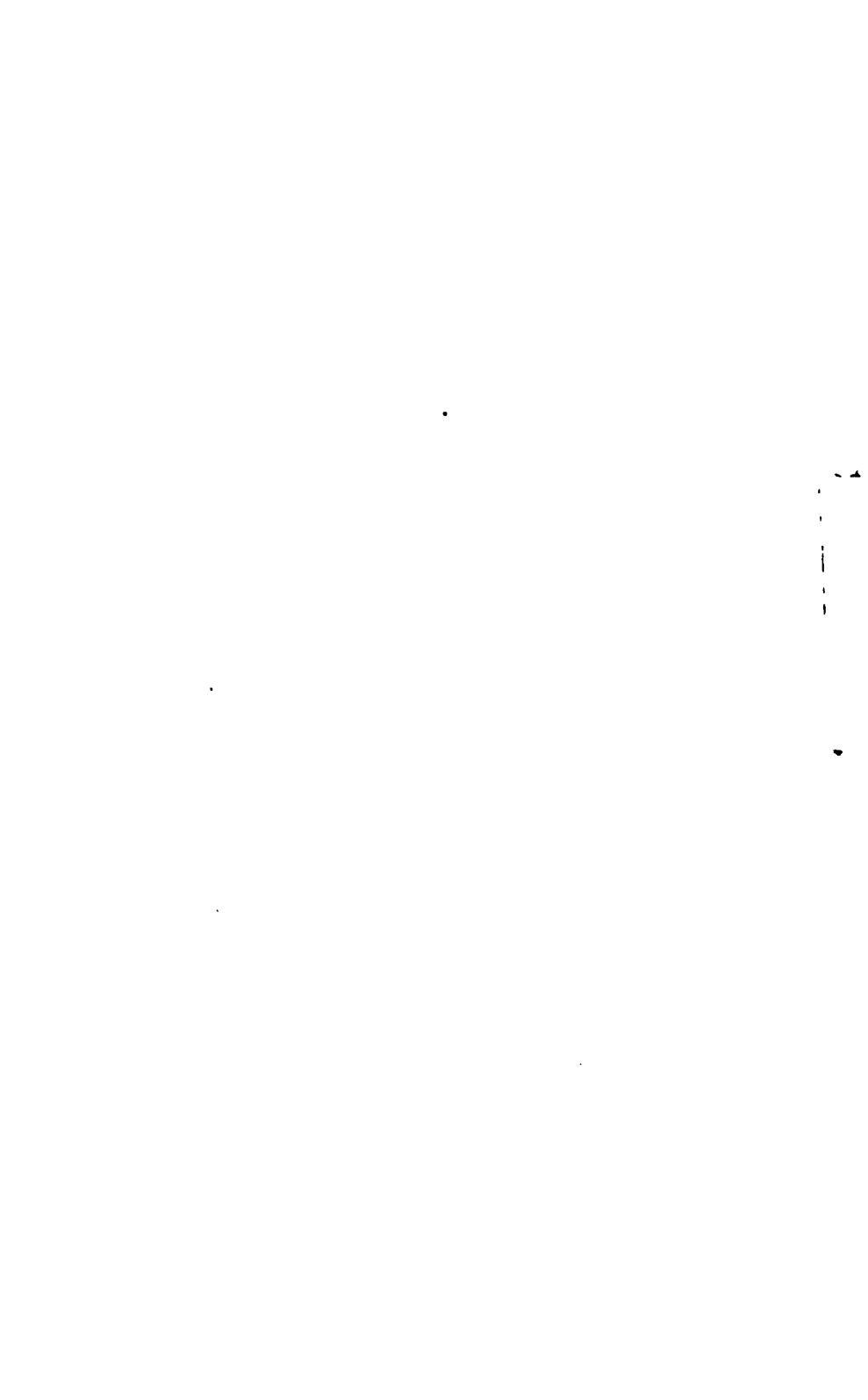
Approved in *People v. Buckley*, 143 Cal. 392, action of trial court in refusing new trial on ground of newly discovered evidence will not be disturbed, unless discretion of court is abused; *People v. Sing Yow*, 145 Cal. 5, applying rule in prosecution for murder.

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1897, new trials:
refused new trial.

106, application of
new, when affir-
med evidence is
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